United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

F 871

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,841

BRUCE C. SCOTT,
Appellant,

v.

JOHN W. MACY, JR., et al.
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRUCE C. SCOTT,
Route 1, Box 166,
Springfield, Virginia,
Plaintiff,

v.

JOHN W. MACY, JR., Chairman, United States Civil Service Commission, Washington, D. C.

FREDERICK J. LAWTON, Vice-Chairman and Member, United States Civil Service Commission, Washington, D. C.

ROBERT E. HAMPTON, Member, United States Civil Service Commission, Washington, D. C.,
Defendants.

Civil Action
No. 1050-63

[Filed April 23, 1963]

COMPLAINT FOR DECLARATORY JUDGMENT AND REVIEW OF DETERMINATION OF SUITABILITY FOR FEDERAL EMPLOYMENT

The plaintiff respectfully alleges:

1. This is an action for declaratory judgment under the Declaratory Judgment Act [28 U.S.C. 2201] and for review under the Administrative Procedure Act [5 U.S.C. 1001].

2. Plaintiff is a citizen of the United States, a resident

of the Commonwealth of Virginia, and an applicant for employment in the classified Civil Service of the United States Government.

3. Defendant, John W. Macy, Jr., is Chairman of the United States Civil Service Commission, and defendants, Frederick J. Lawton and Robert E. Hampton, are each members of the United States Civil Service Commission, and are charged with the statutory duty to determine the fitness and suitability of applicants for employment in the classified Civil Service of the United States Government, and in pursuance of such duties accept applications for employment, prescribe tests of fitness and suitability for employment, make determinations of the eligibility of applicants for employment in the competitive Federal Civil Service, and maintain Civil Service registers of applicants who have been determined to be eligible for employment in the competitive Federal Civil Service.

4. On October 3, 1961, November 13, 1961, and March 20, 1962, plaintiff executed applications for employment pursuant to announcements by the Civil Service Commission that examinations were to be conducted for filling Federal administrative and management positions, management analyst positions, and personnel officer positions.

5. In support of his applications, plaintiff set forth his qualifications for such employment as follows:

(a) Education: Bachelor of Arts degree in Political Science awarded by the University of Chicago, Chicago, Illinois, in June, 1933;

Graduate work in Political Science and Education towards a Master of Arts degree at the University of Chicago from June, 1933, to June, 1935, to the extent of 56 semester hours;

Graduate work for the degree of Master of Arts in Personnel Administration at The George Washington University, Washington, D. C., June, 1957, to June, 1959, to the extent of 24 semester hours [in residence to work on thesis from September, 1959, to June, 1962].

(b) Employment: Research Associate, Office of the Corporation Counsel, City of Chicago, Illinois, August, 1935, to January, 1939;

Inspector [Grade CAF-7], Wage and Hour Division, United States Department of Labor, January, 1939, to June, 1940;

Inspection Report Analyst [Grade CAF-9], Wage and Hour Division, United States Department of Labor, June, 1940, to February, 1942;

Field Supervising Inspector [Grade CAF-11], Wage and Hour and Public Contracts Divisions, U.S. Department of Labor, February, 1942, to March, 1942;

Inspection Liaison Officer [Grade CAF-11], Wage and Hour and Public Contracts Divisions, United States Department of Labor, September, 1943, to June, 1947;

Organization and Methods Examiner [reclassified from CAF-9 to CAF-11 to GS-12], Wage and Hour and Public Contracts Divisions, United States Department of Labor, July, 1947, to February, 1956;

Administrative Assistant II [Personnel Technician], Budget and Personnel Division, Fairfax, Virginia, June, 1959, to November, 1960.

6. Thereafter, the plaintiff took the written tests prescribed by the United States Civil Service Commission for the personnel officer and management analyst positions for which he had applied. He was notified on February 14, 1962, that he had passed the written qualifying tests for the personnel officer positions at grade levels GS-9, GS-11, and

GS-12 in the competitive Federal Civil Service.

7. In addition to the above qualifications, plaintiff is entitled to five-point military preference by reason of active wartime military service in the Army of the United States.

8. Thereafter, representatives of the United States Civil Service Commission conducted an investigation of the plaintiff to determine his suitability for Federal employment.

9. On April 27, 1962, as part of that investigation, Civil Service Commission Investigator T. T. Zubeck interviewed the plaintiff. During the course of the questioning, the following question was put to the plaintiff:

> "The Civil Service Commission has information indicating that you are a homosexual. Do you wish to comment on this matter?"

The plaintiff responded:

> "No. I do not believe the question is pertinent insofar as my job performance is concerned."

10. On May 16, 1962, plaintiff was notified by H. C. Bolton, Chief, Division of Adjudication of the Bureau of Personnel Investigations, United States Civil Service Commission, that:

> "After careful consideration of all of the facts, including your [plaintiff's] statements, the Commission has determined that under the provisions of Section 2.106 of the Civil Service Regulations, you are disqualified for employment in the competitive service because of immoral conduct."

11. By reason of this determination, the Civil Service Commission ruled that all of plaintiff's pending applications for employment have been rated ineligible, that all of plaintiff's eligibilities existing on civil service registers have been cancelled, and that plaintiff is barred from competing in examinations for or accepting appointment to positions in the competitive service for a period of three years from

May 16, 1962.

12. Plaintiff was not advised of the basis upon which he was found to be disqualified because of "immoral conduct".

13. Pursuant to the regulations of the Civil Service Commission, plaintiff appealed the foregoing decision to the Director of the Bureau of Personnel Investigations. In his appeal, plaintiff requested specification of his alleged immoral conduct and explicitly denied that he had ever conducted himself immorally.

14. The Director of the Bureau of Personnel Investigations, Kimbell Johnson, affirmed the decision of the Division of Adjudication in a letter communicated to the plaintiff on June 7, 1962, which stated:

> "It is the decision of this office that the previous action taken was warranted by the facts and required under established standards of suitability for the competitive Federal service. Accordingly, that action is affirmed."

15. No specification of immoral conduct was set forth in the decision by that officer.

16. Pursuant to the regulations of the Civil Service Commission, plaintiff thereafter appealed the foregoing decision to the Board of Appeals and Review of that Commission, and renewed the grounds of his prior appeal.

17. On August 3, 1962, E. T. Groark, Chairman of the Board of Appeals and Review, advised the plaintiff that it

> "finds that the record discloses evidence that you [plaintiff] have engaged in homosexual conduct, which is considered contrary to generally recognized and accepted standards of morality; [that] under Civil Service Regulation 2.106, immoral conduct is a specific disqualification for employment in the competitive Federal service . . ."

and that it affirmed the action of the Bureau of Personnel Investigations.

18. Thereafter, plaintiff appealed the foregoing decision to the United States Civil Service Commission, and urged in support of his appeal that homosexual conduct does not render an applicant for employment in the competitive Federal service unsuitable or unfit for employment in the positions for which plaintiff sought ratings of eligibility.

19. On October 25, 1962, plaintiff was advised that the Civil Service Commissioners have

> "found that error has not been demonstrated in the decisions of the Commission's Bureau of Personnel Investigations and Board of Appeals and Review"

and determined that

> "the decision issued by the Board of Appeals and Review will remain as the final decision of the Commission, thereby exhausting [plaintiff's] administrative remedies."

20. The determination of the defendants and their agents that the plaintiff is disqualified for employment in the competitive Civil Service of the United States Government because of immoral conduct is contrary to law in that

(a) No finding or specification of immoral conduct by the plaintiff is established by the record.

(b) A determination of the morality of the plaintiff's conduct is unrelated to the defendants' statutory authority to prescribe qualifications for Federal employment.

(c) The disqualification of the plaintiff for Federal employment upon the ground of alleged immoral conduct unrelated to the time of such conduct is a denial of due process and violates the Fifth Amendment.

(d) The determination that persons who have engaged in homosexual conduct are not suitable for Federal

employment is unrelated to the statutory authority of the defendants to prescribe qualifications for such employment, is arbitrary, capricious, discriminatory, and denies the plaintiff due process.

(e) The finding that homosexual conduct is "immoral in nature" is arbitrary and capricious.

21. The actions of the defendants in rating all of plaintiff's applications for employment in the Federal competitive service as ineligible and in cancelling all eligibilities which plaintiff then had existing on Civil Service registers are contrary to law in that they are not founded upon grounds authorized by statute.

22. The action in barring plaintiff from competing in examinations for, or accepting employment in, positions in the competitive Federal service until May 16, 1965, is punitive, is not authorized by law, and has been imposed upon plaintiff without due process.

WHEREFORE, plaintiff requests judgment declaring that

(a) Plaintiff's applications for employment in the competitive Federal service may not be rated ineligible upon the ground that he is disqualified for immoral conduct or because he has engaged in homosexual conduct.

(b) Plaintiff's eligibilities on Civil Service registers prior to May 16, 1962, may not be cancelled.

(c) Plaintiff may not be barred from competing for, or accepting appointment to, positions in the competitive Federal service.

(d) For such other and further relief as may seem proper.

/s/ Bruce C. Scott, Plaintiff

/s/ David Carliner
/s/ Fred Simpich
Attorneys for Plaintiff and for the
National Capital Area Civil Liberties
Union

[Filed July 31, 1963]

DEFENDANTS' MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Come now the defendants by their attorney, the United States Attorney for the District of Columbia, and move the Court to dismiss this action on the grounds that the Court lacks jurisdiction over the subject matter, and plaintiff has failed to state a claim upon which relief can be granted.

In the alternative, defendants move for summary judgment on the ground there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

Incorporated into and made a part of defendants' motion for summary judgment by attachment hereto are the certified records of the United States Civil Service Commission relating to this matter, and identified as Government Exhibit "A".

In support hereof, defendants herewith submit a Statement of Material Facts and a Memorandum of Points and Authorities.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Gil Zimmerman
Assistant United States Attorney

[Certificate of Service]

[Filed July 31, 1963]

DEFENDANTS' STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 9(h) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants contend there is no genuine issue as to the following material facts:[1]

1. Plaintiff is an applicant for appointment to the Federal classified civil service. As a result of his executing an application on October 3, 1961 under the Federal Administrative and Management Examination, U-167, an investigation was instituted by the United States Civil Service Commission (hereinafter "Commission") to establish his qualifications and suitability for appointment to the Federal civil service.

2. In the conduct of this investigation, matters came to the attention of the Commission which led to a voluntary interview of plaintiff being conducted by a Commission investigator on May 27, 1962. The transcript of that interview is styled "Report of Special Interview."

3. In this Special Interview, the Commission's investigator specifically placed plaintiff on notice that the interview had been arranged to afford him "an opportunity to answer questions" about matters which had come to the Commission's attention during the investigation to deter-

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[1] In this case, plaintiff seeks judicial review of administrative action. The certified administrative record accompanies defendants' motion for summary judgment. We believe judicial review here, if within the Court's jurisdiction, is limited to consideration of the matter exclusively upon the basis of the certified administrative record.

Accordingly, this Statement of Material Facts—while submitted pursuant to Local Rule 9(h)—is not intended to supersede the facts, as reflected in the whole administrative record. Nevertheless, we have attempted herein to furnish the Court a fair summary of all the material facts.

mine his suitability for Federal employment. He was invited to "make any statements or offer any evidence about the matters to be discussed" which would "present * * * [his] * * * side." And he was told that upon his request a copy of the report of the interview would be furnished him.

4. The transcript of the "Special Interview" contains only the following Questions and Answers:

QUESTION: Mr. Scott, on your application for government employment dated Oct. 3, 1961, you stated that you left your position with Fairfax County "following events arising out of a discussion of whether my being held for investigation in 1951 was an arrest whithin the meaning of the County employment application form". Do you wish to make a statement explaining this matter?

ANSWER: Yes. On an application for the position with Fairfax County, I omitted an "arrest" which occurred in Oct. 1951. I was held for investigation only and felt justified in omitting the "arrest" because I was not specifically charged with a law violation. I did admit this "arrest" on an application for a position with Fairfax County about twelve to fifteen months earlier. The application was for another job and I was turned down. This application was part of my personnel folder.

QUESTION: Mr. Scott, you admit an arrest for Lortering [sic] in 1947 at Washington, D. C. Do you wish to make a statement regarding this arrest?

ANSWER: Yes. At Lafayette Square Men's Room, I was picked up by a police officer. After asking questions I would not answer, he had me charged with lortering. [sic] There was a man in the Men's Room who was behaving in an odd manner. I found I was unable to urinate and stepped outside to wait for him to come out. I went back in about ten minutes later and this fellow was still in the Men's

Room in the same odd position (leaning over the urinal with his hand propped against the wall.) The Police officer followed me in and when I was leaving he said he wanted to talk with me. The Police officer drove up in a Park Police Cruiser when I was outside the Men's Room waiting for the other fellow to come out. He watched me for five minutes before I walked back in.

QUESTION: The Civil Service Commission has information indicating that you are a homosexual. Do you wish to comment on this matter?

ANSWER: No. I do not believe the Question is pertinent in so far as job performance is concerned.

QUESTION: Mr. Scott, do you wish to present any additional information or evidence concerning matters discussed in this interview, or do you desire to make any other statement to the Commission?

ANSWER: Yes.

QUESTION: Mr. Scott, do you feel that you have been accorded full and fair opportunity by the Commission to properly present all information about the question or questions which have been under discussion?

ANSWER: No because I feel the statement of facts concerning the arrest of 1947 is not full enough to show the motivations involved.

It appears that, despite the desire he indicated in the course of this Special Interview, plaintiff subsequently made no effort to submit any additional information or evidence concerning the matters discussed, or to make any other statement, prior to the Commission's initial determination as to his being unsuitable for appointment to the Federal civil service.

4a. The Commission's regulations provide in 5 C.F.R. 2.106 (rev. 1961) that an applicant for appointment to the Federal civil service may be denied examination and appoint-

ment for reason, inter alia, of "immoral" conduct, or for other "legal or other disqualification which makes the applicant unfit for the service." The regulation further provides that: In the discretion of the Commission, a person disqualified for any of the listed reasons may be denied examination, or denied appointment to any competitive position, for a period of three years from the date of the determination of such disqualification. And upon the expiration of the period of debarment such person may not thereafter be appointed to any civil service position until his fitness for appointment shall have been redetermined by the Commission. (The text of this regulation, as reproduced in pertinent part at p. 4 of defendants' memorandum of points and authorities, is incorporated herein by reference.)

5. Acting under this regulation, the Chief of the Commission's Division of Adjudication by letter dated May 16, 1962 notified plaintiff that all of his pending applications had been rated ineligible, all of his eligibilities existing on civil service registers had been cancelled, and he was barred from competing in examinations or accepting appointment to positions in the competitive service for a period of three years from the date of the letter. This letter further stated:

> As a result of this application [executed October 3, 1961], inquiries made to determine your suitability for employment in the competitive Federal service disclosed matters which were presented to you by a representative of the Civil Service Commission on April 27, 1962 [at the Special Interview], for your comments or explanation. After careful consideration of all the facts, including your statements, the Commission has determined that under the provisions of Section 2.106 of the Civil Service Regulations, you are disqualified for employment in the competitive service because of immoral conduct.

Plaintiff was informed that he was privileged to appeal this decision within fifteen days by writing the Division of Adjudication and that, if he appealed, his letter "should

contain any new or additional information" which he believed "would warrant a favorable determination" in his case.

6. Plaintiff took a further appeal by letter dated May 31, 1962. In this appeal letter, plaintiff asked for specification as to his "immoral conduct", and claimed he was entitled to a fair resume of the adverse information in his civil service investigation file. He denied he had ever conducted himself immorally. However, he entered into a disputation as to the meaning of "immoral" conduct. In the course of the letter, plaintiff among other matters adverted to a "classified confidential, prejudicial" statement a "former apartment mate" had given concerning people they had entertained in their apartment, and explained why he thought "the policy of the Civil Service Commission against so-called 'homosexuals' is discriminatory."

7. The Director of the Commission's Bureau of Personnel Investigations by letter ruling dated June 7, 1962 notified plaintiff that his office had sustained the previous action taken as having been "warranted by the facts", and that plaintiff had "furnished no new or additional information on appeal which would justify a reversal of that action." Plaintiff was also advised that he could appeal with seven days to the Commission's Board of Appeals and Review.

8. Plaintiff filed a further appeal in the matter by letter dated June 7, 1962. He asserted inter alia that he had not been informed of the "facts" on which the previous decision was based, and that the Bureau of Personnel Investigations had not answered his request for a fair resume of the adverse information in his civil service investigation file, to which he claimed he was entitled. He again stated that he knew of no acts or conduct on his part which were "immoral". But once more he entered into a disputation as to what is "immoral" conduct. And he argued inter alia that the Commission may not ask a competitive service applicant questions as to "whether he is heterosexual, bisexual, or homosexual." In his view, for almost all classes of Govern-

ment positions the "sexual nature or personality" of the applicant had "no relation to fitness for the positions."

9. The Chairman of the Commission's Board of Appeals and Review by letter ruling dated August 3, 1962 notified plaintiff that the Board had affirmed the action taken by the Commission's Bureau of Personnel Investigations. In its letter, the Board stated the practice of the Commission when unfavorable information is received in a Commission investigation is generally to advise the individual of the nature of the information received and to give him opportunity for comment or rebuttal. In the Board's view, plaintiff had been informed as fully as possible concerning the basis for the action taken, and had received reasonable opportunity to present his side of the matter, in the course of the Special Interview of April 27, 1962 and the subsequent appellate processing of the case. The Board stated it had carefully considered all available information, including the investigative reports, the report of the Special Interview, and all appellate representations submitted by plaintiff. As a result of "its full and impartial review" of the case, the Board concluded the record discloses "convincing evidence" that plaintiff had "engaged in homosexual conduct, which is considered contrary to generally-recognized and accepted standards of morality"; and that under 5 C.F.R. 2.106 immoral conduct is a specific disqualification for employment in the competitive Federal service. As for plaintiff's contentions, the Board stated, they

> —do not materially refute the basis for the action taken, but appear to disagree, in pertinent part, only with the Commission's determination that homosexual conduct is immoral in nature and does not meet requirements of suitability for the Federal service.

(This ruling, as reproduced in essential part at p. 10 of defendants' memorandum of points and authorities, is incorporated herein by reference.)

10. Plaintiff filed a final appeal in the matter to the Commission, itself, by letter dated September 11, 1962.

While not abandoning his claim he was entitled to a resume of the adverse information, or his claim any questioning of him about homosexual conduct is beyond the investigative or other authority of the Commission, plaintiff essentially devoted his final appeal to the contention that it is error for the Commission to rule that homosexuals are unsuitable for appointment to the Federal civil service. For purposes of his final appeal, he chose to let it be assumed that he had engaged in homosexual conduct. He indicated he had refused either to deny or affirm this because in his view his sexual preferences are "as irrelevant to satisfactory job performance" as his "gustatory, political, or religious preferences." Thus, although placed expressly on notice by the Commission's Board of Appeals and Review in its letter ruling of August 3, 1962 that the available information convincingly disclosed he had engaged in homosexual conduct, plaintiff chose neither to deny that fact, nor to offer any material in rebuttal.

11. The Commission by letter dated October 25, 1962 notified plaintiff as follows:

> The Civil Service Commissioners have given careful consideration to your request, and have found that error has not been demonstrated in the decisions of the Commission's Bureau of Personnel Investigations and Board of Appeals and Review, rating you ineligible on suitability grounds, cancelling your applications and eligibilities, and barring you from competitive Federal Service for a period of three years; and that there is insufficient justification in the current representations for a reversal or modification of the previous decisions.

The Commission also informed plaintiff in this letter that the August 3, 1962 ruling of the Commission's Board of Appeals and Review remained as the Commission's final decision in the matter, thereby exhausting his administrative remedies.

/s/ David C. Acheson
United States Attorney

* * *

[Filed August 14, 1963]

MOTION FOR SUMMARY JUDGMENT

Plaintiff moves for summary judgment upon the ground that there is no genuine issue as to material facts and that as a matter of law plaintiff is entitled to judgment.

/s/ David Carliner
***
/s/ Fred Simpich
***

[Certificate of Service]

[Filed August 14, 1963]

PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

Plaintiff sets forth the following material facts as to which there is no genuine issue.

1. On October 3, 1961, November 13, 1961, and March 20, 1962, plaintiff executed applications for employment pursuant to announcements by the Civil Service Commission that examinations were to be conducted for filling Federal administrative and management positions, management analyst positions, and personnel officer positions.

2. In support of his applications, plaintiff set forth his qualifications for such employment as follows:

(a) Education: Bachelor of Arts degree in Political Science awarded by the University of Chicago, Chicago, Illinois, in June, 1933;

Graduate work in Political Science and Education towards a Master of Arts degree at the University of Chicago from June, 1933, to June, 1935, to the extent of 56 semester hours;

Graduate work for the degree of Master of Arts in

Personnel Administration at The George Washington University, Washington, D. C., June, 1957, to June, 1959, to the extent of 24 semester hours [in residence to work on thesis from September, 1959, to June, 1962].

(b) Employment: Research Associate, Office of the Corporation Counsel, City of Chicago, Illinois, August, 1935, to January, 1939;

Inspector [Grade CAF-7], Wage and Hour Division, United States Department of Labor, January, 1939, to June, 1940;

Inspection Report Analyst [Grade CAF-9], Wage and Hour Division, United States Department of Labor June, 1940, to February, 1942;

Field Supervising Inspector [Grade CAF-11], Wage and Hour and Public Contracts Divisions, United States Department of Labor, February, 1942, to March, 1942;

Inspection Liaison Officer [Grade CAF-11], Wage and Hour and Public Contracts Divisions, United States Department of Labor, September, 1943, to June, 1947;

Organization and Methods Examiner [reclassified from CAF-9 to CAF-11 to GS-12], Wage and Hour and Public Contracts Divisions, United States Department of Labor, July, 1947, to February, 1956;

Administrative Assistant II [Personnel Technician], Budget and Personnel Division, Fairfax County, Fairfax, Virginia, June, 1959, to November, 1960.

3. Thereafter, the plaintiff took the written tests prescribed by the United States Civil Service Commission for the personnel officer and management analyst positions for which he had applied. He was notified on February 14, 1962, that he had passed the written qualifying tests for the personnel officer positions at grade levels GS-9, GS-11, and GS-12 in the competitive Federal Civil Service.

4. In addition to the above qualifications, plaintiff is entitled to five-point military preference by reason of active wartime military service in the Army of the United States.

5. On April 27, 1962, Civil Service Commission Investigator T. T. Zubeck interviewed the plaintiff during the course of an investigation of his eligibility for Federal employment. During the course of the questioning, the following question was put to the plaintiff:

> "The Civil Service Commission has information indicating that you are a homosexual. Do you wish to comment on this matter?"

The plaintiff responded:

> "No. I do not believe the question is pertinent insofar as my job performance is concerned."

6. On May 16, 1962, plaintiff was notified by H. C. Bolton, Chief, Division of Adjudication of the Bureau of Personnel Investigations, United States Civil Service Commission, that:

> "After careful consideration of all of the facts, including your [plaintiff's] statements, the Commission has determined that under the provisions of Section 2.106 of the Civil Service Regulations, you are disqualified for employment in the competitive service because of immoral conduct."

7. By reason of this determination, the Civil Service Commission ruled that all of plaintiff's pending applications for employment have been rated ineligible, that all of plaintiff's eligibilities existing on civil service registers have been cancelled, and that plaintiff is barred from competing in examinations for or accepting appointment to positions in the competitive service for a period of three years from May 16, 1962.

8. Plaintiff was not advised of the basis upon which he was found to be disqualified because of "immoral conduct".

9. Pursuant to the regulations of the Civil Service Commission, plaintiff appealed the foregoing decision to the

Director of the Bureau of Personnel Investigations. In his appeal, plaintiff requested specification of his alleged immoral conduct and explicitly denied that he had ever conducted himself immorally.

10. The Director of the Bureau of Personnel Investigations, Kimbell Johnson, affirmed the decision of the Division of Adjudication in a letter communicated to the plaintiff on June 7, 1962, which stated:

> "It is the decision of this office that the previous action taken was warranted by the facts and required under established standards of suitability for the competitive Federal service. Accordingly, that action is affirmed."

11. Pursuant to the regulations of the Civil Service Commission, plaintiff thereafter appealed the foregoing decision to the Board of Appeals and Review of the Commission, and renewed the grounds of his prior appeal.

12. On August 3, 1962, E. T. Groark, Chairman of the Board of Appeals and Review, advised the plaintiff that it

> "finds that the record discloses evidence that you [plaintiff] have engaged in homosexual conduct, which is considered contrary to generally recognized and accepted standards of morality; [that] under Civil Service Regulation 2.106, immoral conduct is a specific disqualification for employment in the competitive Federal service . . ."

and that it affirmed the action of the Bureau of Personnel Investigations.

13. Thereafter, plaintiff appealed the foregoing decision to the United States Civil Service Commission, and urged in support of his appeal that homosexual conduct does not render an applicant for employment in the competitive Federal service unsuitable or unfit for employment in the positions for which plaintiff sought ratings of eligibility.

14. On October 25, 1962, plaintiff was advised that the Civil Service Commissioners have

"found that error has not been demonstrated in the decisions of the Commission's Bureau of Personnel Investigations and Board of Appeals and Review"

and determined that

"the decision issued by the Board of Appeals and Review will remain as the final decision of the Commission, thereby exhausting [plaintiff's] administrative remedies."

/s/ David Carliner
***

/s/ Fred Simpich
***

* * *

[Filed January 22, 1964]

ORDER

This cause having come before the Court on defendants' motion to dismiss and alternative motion for summary judgment, and plaintiff's cross motion for summary judgment; counsel having been heard; the Court having considered the record and the memoranda filed by the parties; and the Court being fully advised in the premises and having entered its oral opinion in the case on January 14, 1964,

It is this 22nd day of January, 1964

ORDERED, ADJUDGED AND DECREED:

(1) That defendants' motion for summary judgment be, and the same hereby is, granted, and

(2) That plaintiff's cross motion for summary judgment be, and the same hereby is, denied, and his action is dismissed.

/s/ George L. Hart, Jr.
United States District Judge

[Certificate of Service]

[Filed January 30, 1964]

NOTICE OF APPEAL

Notice is hereby given this 30th day of January, 1964, that plaintiff Bruce C. Scott hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order of this Court entered on the 22nd day of January, 1964.

/s/ David Carliner

* * *

Attorney for Plaintiff

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18483

BRUCE C. SCOTT, APPELLANT

v.

JOHN W. MACY, JR., CHAIRMAN, UNITED STATES CIVIL SERVICE COMMISSION, ET AL., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided June 16, 1965

Mr. David Carliner, with whom *Mr. David Isbell* was on the brief, for appellant.

Mr. Martin R. Hoffmann, Assistant United States Attorney, with whom *Messrs. David C. Acheson,* United States Attorney, *Frank Q. Nebeker* and *Gil Zimmerman,* Assistant United States Attorneys, were on the brief, for appellees.

Before BAZELON, *Chief Judge,* and BURGER and McGOWAN, *Circuit Judges.*

BAZELON, *Chief Judge:* Following competitive examinations for Federal civil service employment, appellant was

notified in February 1962 that he had qualified for "personnel positions" at grade levels GS-9, 11 and 12, subject to further investigation. In April 1962, he appeared before a Civil Service investigator, who requested explanation regarding a 1947 arrest for "loitering," a 1951 arrest "for investigation," and "information [in the Civil Service Commission's possession] indicating that you are a homosexual." Appellant explained the circumstances of the 1947 arrest,[1] stated that he was "not specifically charged with a law violation" in 1951, and refused to comment on the alleged homosexuality because he did "not believe the Question is pertinent in so far as job performance is concerned."

On May 16, 1962, the Commission "disqualified [appellant] for employment in the competitive service because of immoral conduct."[2] He then requested a "specification

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[1] Appellant's explanation was as follows:

"At Lafayette Square Men's Room, I was picked up by a police officer. After asking questions I would not answer, he had me charged with lortering [*sic*]. There was a man in the Men's Room who was behaving in an odd manner. I found I was unable to urinate and stepped outside to wait for him to come out. I went back in about ten minutes later and this fellow was still in the Men's Room in the same odd position (leaning over the urinal with his hand propped against the wall). The Police officer followed me in and when I was leaving he said he wanted to talk with me."

[2] The Commission relied on Civil Service Regulations, 5 C.F.R. § 2.106 (1961 ed.):

"*Disqualifications of applicants.*

"(a) *Grounds for disqualification.* An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:

* * *

"(3) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;"

of how, when and where [he had allegedly] conducted [himself] immorally so that [he] may adequately answer the broad, indefinite allegation of 'immoral conduct' . . . ."[3] The Commission's Board of Appeals and Review responded only that "the record disclosed convincing evidence that you have engaged in homosexual conduct, which is considered contrary to generally-recognized and accepted standards of morality. . . ." After exhausting his administrative remedies, appellant unsuccessfully attacked the Commission's action in the District Court. This appeal followed.

Appellant has standing to challenge his exclusion from public employment. The Government's contrary argument is that "there is no basic right to public employment; stated another way, the power of appointment—absent statute or regulation—is exclusively within the prerogative of the Executive."[4] The argument is too broad. "[I]t does not at all follow that because the Constitution does not guarantee a right to public employment, [the Government] may resort to any scheme for keeping people out of such employment. Law cannot reach every discrimination in practice. But doubtless unreasonable discrimination . . . would not survive constitutional challenge."[5] As this court has said, "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."[6]

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[3] Judge McGowan's opinion clearly shows that appellant did not abandon this request either before the Commission or this court.

[4] Brief for appellee, p. 6.

[5] *Garner* v. *Board of Public Works of Los Angeles*, 341 U.S. 716, 725 (1951) (concurring opinion). See *Weiman* v. *Updegraff*, 344 U.S. 183, 192 (1952); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 894 (1961).

[6] *Homer* v. *Richmond*, 110 U.S.App.D.C. 226, 229, 292 F.2d 719, 722 (1961).

Appellant is an applicant for public employment, and thus may have less statutory protection against exclusion than an employee.[7] But he is not without constitutional protection.[8] The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government. The Executive may have discretion in hiring or firing, but "discretionary power does not carry with it the right to its arbitrary exercise." *Shachtman* v. *Dulles*, 96 U.S. App. D.C. 287, 290, 225 F. 2d 938, 941 (1955).

The Commission excluded appellant from public employment because it concluded that he had engaged in "immoral conduct."[9] With this stigma, the Commission not only

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[7] See, *e.g.*, 5 U.S.C. § 652 (1958), regarding procedural requirements for removal or suspension from classified civil service; 5 C.F.R. § 731.302(a), that after one year, an appointee may be removed for reasons which would originally have disqualified him from appointment "only on the basis of intentional false statement or deception or fraud in examination or appointment."

[8] See *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *In re Summers*, 325 U.S. 479, 571 (1945); *United Public Workers of America* v. *Mitchell*, 330 U.S. 74, 100 (1947); *Hunter* v. *McLaughlin*, 102 U.S. App.D.C. 293, 252 F.2d 857 (1958); *Eaton* v. *Grubbs*, 329 F.2d 710 (4th Cir. 1964). In *Joint Anti-Fascist Refugee Committee* v. *McGrath*, Mr. Justice Jackson, concurring, stated: "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally. *Perkins* v. *Elg* [307 U.S. 325, 349]." 341 U.S. 123, 185 (1951).

[9] It is not necessary to decide whether the Commission may exclude an applicant for public employment without giving reasons since a reason was given; thus we must face the issue of the sufficiency of that reason. Compare, *e.g.*, *Perkins* v. *Elg*, *supra*, note 8; *Shachtman* v. *Dulles*, 96 U.S.App.D.C. 287, 225 F.2d 938 (1955).

disqualified him from the vast field of all employment dominated by the Government[10] but also jeopardized his ability to find employment elsewhere. The stigmatizing conclusion was supported only by statements that appellant was a "homosexual" and had engaged in "homosexual conduct."[11] These terms have different meanings for different people.[12] They therefore require some specifica-

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[10] Compare, *e.g.*, *Greene* v. *McElroy*, 360 U.S. 474 (1959).

[11] Appellant's 1947 and 1951 arrests for "loitering" and "investigation" in no way establish "immoral conduct." Even assuming that conduct considered immoral by the police was involved in the arrests, it does not appear that convictions, or even forfeiture of collateral, followed. Compare *Pelicone* v. *Hodges*, 116 U.S.App.D.C. 32, 320 F.2d 754 (1963).

[12] The Senate Subcommittee which investigated "Employment of Homosexuals and Other Sex Perverts in Government," stated:

> "It was determined that even among the experts there existed considerable difference of opinion concerning the many facets of homosexuality and other forms of sex perversion. Even the terms 'sex pervert' and 'homosexual' are given different connotations by the medical and psychiatric experts. [S.Doc.No. 241, 81st Cong., 2d Sess. 2 (1950).]

Compare Thompson, *Changing Concepts of Homosexuality in Psychoanalysis*, 10 PSYCHIATRY: JOURNAL OF THE BIOLOGY AND PATHOLOGY OF INTERPERSONAL RELATIONS 183 (1947):

> "The term 'homosexual' as used in psychoanalysis has come to be a kind of wastebasket into which are dumped all forms of relationships with one's own sex. The word may be applied to activities, attitudes, feelings, thoughts or repression of any of these. In short, anything which pertains in any way to a relationship, hostile or friendly, to a member of one's own sex may be termed homosexual."

See generally Donnelly, Goldstein & Schwartz, CRIMINAL LAW 137-201 (1962).

tion.[13] The Commission must at least specify the conduct it finds "immoral"[14] and state why that conduct related to "occupational competence or fitness,"[15] especially since the Commission's action involved the gravest consequences. Appellant's right to be free from governmental defamation requires that the Government justify the necessity for

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[13] Unlike the present case, specific immoral acts were clearly alleged and admitted in *Dew* v. *Halaby*, 115 U.S.App.D.C. 171, 317 F.2d 582 (1963), *cert. dismissed pursuant to Rule 60 of the Supreme Court rules, after settlement by agreement of the parties*, 379 U.S. 951 (1964). Dew was discharged as a Federal Aviation Agency control tower operator because of "at least four [admitted] unnatural sex acts with males, some of them for pay" and "smoking marijuana cigarettes on at least five [admitted] occasions." 115 U.S.App.D.C. at 172, 317 F.2d at 583. The court found an agency judgment that "efficiency will not be promoted by . . . [an employee whose] past did not demonstrate qualities of character, stability, and responsibility," 115 U.S.App.D.C. at 177, 317 F.2d at 588, in view of the "exacting nature of the duties and responsibilities of control tower operators." 115 U.S.App.D.C. at 176 n. 11, 317 F.2d at 587 n. 11.

[14] Precise allegations of the conduct in question would also give an applicant an opportunity, not afforded in this case, to explain or contradict the allegations. There is no suggestion in this record that specific allegations of misconduct were withheld to protect confidential informants, and we need not decide whether such purpose might justify the Commission's refusal to give details of alleged misconduct. Cases involving security dismissals based on undisclosed information, such as *Bailey* v. *Richardson*, 86 U.S.App.D.C. 248, 182 F.2d 46 (1950), *affirmed*, 341 U.S. 918 (1951), are not applicable here.

[15] *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). In that case, a state requirement that teacher applicants disclose all association memberships was set aside because the state had failed to show the legitimate relationship of such disclosure to occupational qualifications sufficiently to justify the resulting inhibition of associational freedom. In *United Public Workers of America* v. *Mitchell*, 330 U.S. 74, 101 (1947), the

imposing the stigma of disqualification for "immoral conduct."[16]

The Commission may not rely on a determination of "immoral conduct," based only on such vague labels as "homosexual" and "homosexual conduct," as a ground for disqualifying appellant for Government employment. For this reason, and for the reasons stated in Judge McGowan's separate opinion, we reverse the judgment of the District Court and remand the case with instructions to enter summary judgment for appellant. In my view, this does not preclude the Commission from excluding appellant from eligibility for employment for some ground other than the vague finding of "immoral conduct" here.[17]

McGOWAN, *Circuit Judge, concurring:* I join in the result reached by Judge Bazelon solely for what seem to me to be the inadequacies, in terms of procedural fairness, of the notice given to appellant of the specific elements constituting the "immoral conduct" relied upon as disqualifying him for all federal employment. The consequences of this result I take to be as follows: The District Court's

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Court stated, "For regulation of employees it is . . . necessary that the act regulated be . . . reasonably deemed . . . to interfere with the efficiency of the public service." See *Vitarelli* v. *Seaton*, 359 U.S. 535, 542-43 & n. 5 (1959); *Schware* v. *Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238-39 (1957); Reich, *The New Property*, 73 YALE L. J. 733, 782 (1964).

[16] Compare *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *Shelton* v. *Tucker*, *supra*, note 13; *Bland* v. *Connally*, 110 U.S.App.D.C. 375, 293 F.2d 852 (1961). *Cf. Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 898-99 (1961).

[17] See *Perkins* v. *Elg*, 307 U.S. 325, 350 (1939).

grant of summary judgment to appellees is reversed; and, in the light of the reason for this reversal, it is appropriate for a judgment to be entered which has the effect of restoring appellant to his original status, that is to say, one who has met the competitive examination requirements for certain grade levels and who, absent any further action by the Civil Service Commission to disqualify him, is eligible to be considered for employment by the employing agencies. This status obviously does not assure him of any federal employment; and the Commission is, of course, free to initiate such further action as it chooses to exclude him from eligibility even for consideration, subject as always to appropriate procedural standards. The substantive issues which might conceivably emerge from the record developed at such a proceeding are not presently before us, and are not now to be anticipated.

Disqualification from consideration for all federal employment is not, in my view, a status which can arbitrarily be imposed upon any citizen. I think it was arbitrary, on this record, for appellant to be disqualified for "immoral conduct" and to be told, in response to his request for a specification, only that he had engaged in "homosexual conduct." It is true, as the dissent points out, that appellant came perilously close to abandoning this claim to lack of adequate notice, but I do not read the record as showing that this brink was ever finally crossed. The waiver is said to have occurred at the time of appellant's final appeal to the Commission, but, although appellant there displayed a patent preoccupation with what he conceived to be a transcending issue of principle implicit in his case, this is a common failing of litigants, especially those who are representing themselves, as was appellant at that time.

Even here, however, he reiterated his right to know exactly what he was supposed to have done which caused him to be disqualified. There are allegations embodying

this issue in the complaint in the District Court; and, in the appellees' own statement of material facts in support of their motion for summary judgment, it is averred that appellant had requested specification of his "immoral conduct" in his appeal from the Division of Adjudication and that, in his appeal to the Commission, "*while not abandoning his claim that he was entitled to a resume of the adverse information* . . . [he] essentially devoted his final appeal to the contention that it is error for the Commission to rule that homosexuals are unsuitable for appointment. . . ." (Emphasis supplied.) Neither in the District Court nor in this court did appellees think it wise to fail to meet on the merits this procedural issue of lack of adequate notice; and counsel for appellant in this court, although apparently sharing appellant's concern with the broader aspects of the case, remained true to his professional instincts by not submerging completely his client's interest in having a job in the larger and more venturesome quest of a principle of general application. Alternative contentions are the familiar stuff of the law, and I am not prepared to say that this record falls outside this pattern.

Upon the assumption (which may or may not be correct) that the Executive Branch can freely dismiss employees from the federal service except as limited by express provision of statute or regulation, it is said that it must be *a fortiori* privileged to refuse employment to a mere applicant therefor. As does this formulation, so do I put the Constitution to one side for present purposes, not because I have ever been able to grasp the precise implications of the ancient axiom that there is no constitutional right to public employment, but because I do not read the relevant statute and regulation as contemplating the procedure followed here in disqualifying appellant. Both statute and regulation are phrased in the most general terms, and they certainly imply a wide area of discre-

tion on the part of federal employers in choosing among applicants. But the broad letter of 5 U.S.C. § 631 is far from inconsistent with a Congressional purpose that "each candidate" who "seeks to enter" federal employment shall have a fair opportunity to assert his "fitness," both affirmatively and by way of opportunity to know of, and to defend against, asserted personal shortcomings which are officially characterized as "immoral conduct" within the meaning of regulations issued in implementation of the statute. Appellant had the one in the form of competitive examinations. But, in the other respect, the legislative purpose does not seem to me to have been adequately realized.

BURGER, *Circuit Judge, dissenting*: My colleagues do not agree and hence there is no opinion of the court on the basis of the remand in this case. I find myself unable to agree with either of the two opinions. Judge Bazelon reaches far out to deal with a problem which is not before us and which is essentially one of broad Legislative and Executive policy. The basic issue in the case is narrow and limited: Is there a reasonable basis for the Commission's determination that conduct of Appellant, which he asked the Commission to "assume" and which is admittedly criminal under existing statutes, affords an adequate basis for his disqualification for federal employment? However, since my colleagues do not agree with each other and each undertakes to decide a question not properly here for decision, I set forth my analysis of the case.

(1)

Whatever the merits of Appellant's contention that "procedural due process" entitled him to a statement of

the specifics of the conduct the Commission found him to have engaged in. Appellant has waived that contention by his actions and litigation position before the Commission. At every stage of his appeal within the Commission Appellant's position was a challenge to the right of the Government to inquire at all into his sexual habits, on the ground that they were irrelevant to his suitability for employment. To be sure, he also demanded to know the specifics of the conduct underlying the Commission's decision, but the essence of his position was that his private life was none of the Government's business. This is seen, for example, in his refusal at the Commission interview to respond to the Commission's request that he comment on the Commission's statement that it had evidence indicating his homosexuality. Instead of requesting details, or making a denial, Appellant responded, "I do not believe the Question is pertinent in so far as job performance is concerned." Similarly Appellant's prayer for relief to the Board of Appeals and Review sought summary reversal of the action taken on his application—not merely disclosure to him of the adverse information in his file for purposes of rebuttal. As the Board remarked,

> The contentions which you have submitted do not materially refute the basis for the action taken, but appear to disagree . . . only with the Commission's determination that homosexual conduct is immoral in nature and does not meet requirements of suitability for the Federal service.

Appellant's request to the Board of Appeals for summary reversal of the Commission action in his case, taken alone, or even together with his constant assertion of the irrelevance of his sexual habits to employment eligibility, might not suffice as a waiver of the issue of specificity. But on his final administrative appeal, to the Commissioners themselves, Appellant explicitly requested the Commission to

> assume that I have engaged in "homosexual conduct,"

> and let me equate "homosexual conduct" with "homosexual outlet" as used in Chapter 21, pages 610-666, of *Sexual Behavior of the Human Male* by Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, and with "homosexual responses and contacts" as used in Chapter 11, pages 446-501, of *Sexual Behavior of the Human Female* by the same authors with Paul Gebhard. (Footnotes omitted.)

In this situation the Commission had the right to take Appellant at his word and to assume he had engaged in conduct which, as indicated by his references, would have been punishable as a crime under D.C. CODE § 22-3502 (1961). Thus Appellant himself, by his litigation position at the interview, before the Board of Appeals and before the Commission, supplied the very specificity he now claims he sought. I do not believe it open to him to raise in this court the question of his right to have the Commission be more specific after relieving the Commission of any such duty it might otherwise have had, by asking that the Commission "assume . . . homosexual conduct."

(2)

Assuming for argument that Appellant has preserved his procedural contentions, however, I analyze the merits of those contentions. Judge Bazelon appears to adopt Appellant's argument that the due process clause of the Fifth Amendment required the Commission to disclose in greater detail its evidence against Appellant. Judge Bazelon does not in terms say so, but his view presumably is that the Commission's procedure unduly restricted the "liberty" spoken of in that amendment. I believe that position to be untenable. As a mere applicant for government employment, Appellant can hardly claim higher rights of process than one who is already a government employee. And the Supreme Court, in *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 896 (1961), pointed out that it had

> consistently recognized that . . . the interest of a government employee in retaining his job . . . can be summarily denied. It has become a settled principle that government employment, *in the absence of legislation,* can be revoked at the will of the appointing officer. (Emphasis added.)

See also *Vitarelli* v. *Seaton,* 359 U.S. 535, 539 (1959); *Bailey* v. *Richardson,* 86 U.S.App.D.C. 248, 267, 182 F.2d 46, 65 (1950), *aff'd by an equally divided Court,* 341 U.S. 918 (1951).

In sum it must be conceded that the Government in its capacity as an employer may "hire and fire," select and reject at will, restrained only as Congress by statute, the President by Executive Order or an Executive Agency by Regulation has curtailed that right. To put it another way, absent statute or authorized regulation conferring on Appellant a right to more refined procedures than given the Commission's action must stand unless its announced basis is "patently arbitrary or discriminatory." *Cafeteria Workers, supra,* 367 U.S. at 898. See also *Wieman* v. *Updegraff,* 344 U.S. 183 (1952); *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). It may be that the government employee's or employment seeker's lack of procedural rights, absent statute or regulation, effectively undermines his conceded substantive right not to be excluded from employment for arbitrary reasons, see *Cafeteria Workers, supra,* at 900 (dissenting opinion); but it is hardly the province of a Court of Appeals to erect procedural safeguards thus far consistently rejected by the Supreme Court.[1]

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[1] In addition to the requirement the court now imposes on the Commission to make known the specifics of alleged disqualifying conduct, Judge Bazelon would impose a further obligation on the Commission to spell out the relationship between any such conduct and suitability for public employment. I have always thought this exclusively a policy issue

Judge McGowan takes a different position and avoids any constitutional issue because he finds the Commission's procedures inconsistent with the congressional purpose manifested in 5 U.S.C. § 631. He relies on the following language of that section:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries . . . .

I am unable to read this statute as creating in Appellant the rights he claims. I read it as an authorization addressed to the President, and no one else, empowering him to promulgate regulations dealing with the selection of government employees and to ascertain the fitness and ability of candidates.

The President must be presumed to know the powers conferred upon him by Section 631 to promulgate appropriate procedures for dealing with *applicants* for federal employment. Acting pursuant to that Section, President Kennedy in 1962 directed the Commission to formulate regulations dealing with adverse actions against *employees* of the departments and agencies of the federal government.[2] I intimate no view as to what the Regulations so

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for the political branches to resolve. Apart from the question whether the Constitution compels such a procedure, I see no function for it. If information concerning certain conduct may legitimately be considered by the Commission, then no such statement is needed; if, on the other hand, certain information may not properly be considered in a case, then no such statement can validate its use.

[2] Exec. Order No. 10987, 27 Fed. Reg. 550.

The Commission has provided that employees shall receive "at least 30 full days' advance written notice stating any

promulgated (excerpted in note 2, *supra*) would require the Commission to disclose to Appellant were he an employee rather than simply an applicant. I point to those Regulations merely to show the manner in which they were promulgated and their purpose. As I see it this is the way in which Section 631 was intended to operate. The skeletal framework of that Section can confer no rights on Appellant Scott as an *applicant* until it has been implemented by Executive action comparable to that taken by President Kennedy with respect to adverse actions against *employees*. Section 631 standing alone is not a Magna Carta for applicants and surely it is not a Bill of Rights for deviates.

(3)

Because in my view Appellant has waived his procedural contentions I turn to a consideration of his substantive argument that homosexual conduct is an arbitrary ground for exclusion from employment. This is the argument which, by inference at least, Judge Bazelon considers open by suggesting that the Commission ought to spell out[3] the relationship between homosexual conduct and suita-

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and all reasons, specifically and in detail, for the proposed action." 5 C.F.R. § 752.202(a) (1964).

> If the employee answers, the agency shall consider the answer in reaching its decision. The employee is entitled to answer personally, or in writing, or both . . . . The right to answer personally includes the right to answer orally in person by being given a reasonable opportunity to make any representation which the employee believes might sway the final decision on his case, but does not include the right to a trial or formal hearing with examination of witnesses.

5 C.F.R. § 752.202(b) (1964).

[3] This suggestion emanates only from one member of the court and is not therefore a mandate of the court.

bility for federal employment. In view of the actions of the Congress and the Executive I do not consider this question open.

The Commission implemented 5 U.S.C. § 631, *supra*, with a regulation, 5 C.F.R. § 2.106 at times here relevant[4], which provides *inter alia* that an eligible applicant may be denied employment because of immoral conduct. I assume no one would be so brash as to argue that this regulation is not authorized by the statute. See *Dew* v. *Halaby*, 115 U.S.App.D.C. 171, 317 F.2d 582 (1963), *cert. dismissed*, 379 U.S. 951 (1964). Congress expressed a determination, which would seem to be reasonable, that the character and habits of an individual may have as much to do with his suitability for federal employment as his knowledge and ability.

Wisely or not Congress, in common with a host of other law making bodies, has defined as criminal the homosexual conduct stipulated to by Appellant in his final appeal at the Commission. Whether it is sound legislative policy to attempt to deal with sex deviates under the criminal law is not open to judges but one can hardly doubt that such conduct is regarded as immoral under contemporaneous standards of our society. This court is in no position, then, to overturn, or even to question, an Executive determination authorized by Congress that homosexual conduct warrants a disqualification from federal employment. In all events it was no abuse of discretion to reject Appellant's application for the sensitive position of personnel officer, a station requiring a balanced approach to human relationships and a position of great power in the selection and assignment of other federal employees. Congress of course could, as a matter of legislative policy, provide for example that sex deviates, chronic alcoholics, former felons and various other categories suf-

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[4] The current citation is 5 C.F.R. § 731.201(b) (1964).

fering infirmities would be eligible for federal employment in non-sensitive areas. But it is not our role to embark on such policy ventures.

In *Dew* v. *Halaby, supra,* which is controlling on the substantive aspects of this case both for this court and the Commission, a federal employee was discharged for pre-employment homosexual conduct at a time when Commission regulations expressly provided that facts sufficient to disqualify an applicant for a position were likewise sufficient to justify discharge of an employee. We upheld Dew's discharge, which was based upon the same regulation, involved in the present case. We noted that Dew did not contend that the homosexual conduct involved was not condemned by that regulation: "in fact, it is difficult to see how he could ask a court to hold that the agency erred in so considering it." *Id.* at 175, 317 F.2d at 586. (Footnote omitted.) We did not question that the regulation itself was valid.

As *Dew* v. *Halaby* recognizes, our inquiry into the merits of Appellant's disqualification, once he had asked that his involvement in homosexual conduct be assumed, can seek only to discern whether the Commission's action was rationally based or whether, on the other hand, its action was arbitrary and capricious. *Id.* at 178, 317 F.2d at 589.[5] And that case is authority that homosexual conduct is not an irrational ground for disqualification.

Since precedent, contemporary standards, and common sense require rejection of Appellant's substantive argument, and since he can point to no statute or regulation granting him more process than he received, I would affirm the summary judgment for Appellees.

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[5] Moreover, a complaint which merely makes a conclusory allegation of administrative arbitrariness or caprice does not state a claim upon which relief may be granted. "Substantiating allegations" must be made. Hunter v. McLaughlin, 102 U.S.App.D.C. 293, 294, 252 F.2d 857, 858 (1958).

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term, 1964

No. 18,483

Civil 1050-63
FILED June 16, 1965

BRUCE C. SCOTT, Appellant,

v.

JOHN W. MACY, JR., Chairman, United States Civil Service Commission, et al., Appellees,

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Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, and Burger and McGowan, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment - - - - - - - - - - of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and it is hereby, remanded to the District Court with instructions to enter summary judgment for appellant.

Per Chief Judge Bazelon

Dated: June 16, 1965

Separate concurring opinion by Circuit Judge McGowan.
Separate dissenting opinion by Circuit Judge Burger.

ORDER AND JUDGMENT ON MANDATE

Pursuant to the Order and Judgment of the United States Court of Appeals for the District of Columbia Circuit dated June 16, 1965, it is by this Court this 15th day of September, 1965,

ORDERED, ADJUDGED and DECREED:

1. That the judgment of this Court entered in this cause on January 22, 1964 in favor of defendants be, and the same hereby is, vacated; and

2. That summary judgment be, and the same hereby is, entered for plaintiff, without prejudice to the Civil Service Commission making a new determination, if it so desires, of plaintiff's suitability for Federal employment, in a manner not inconsistent with the Court of Appeals' decision.

/s/ George L. Hart, Jr.
United States District Judge

MOTION TO ENFORCE JUDGMENT ON MANDATE

Plaintiff moves to enforce the Judgment on mandate entered by the Court on the 15th day of September, 1965 and to direct that the defendants may not rate the plaintiff ineligible for federal employment upon the ground that he is disqualified for immoral conduct.

DAVID CARLINER
Attorney for Plaintiff
902 Warner Building
Washington, D. C. 20004

DEFENDANTS' OPPOSITION TO MOTION TO ENFORCE JUDGMENT ON MANDATE; AND DEFENDANTS' MOTION TO AFFIRM CURRENT CIVIL SERVICE COMMISSION DECISION

Come now defendants by their attorney, the United States Attorney for the District of Columbia, in opposition to plaintiff's "Motion to Enforce Judgment on Mandate". Defendants also hereby move the Court to affirm the current decision of the United States Civil Service Commission ("CSC") in plaintiff's case. In support hereof, defendants aver:

1. The CSC has conducted new administrative proceedings that are proper and valid, following entry by this Court on September 15, 1965 of its Order and Judgment pursuant to the decision of the Court of Appeals of June 10, 1965 (reported 121 U.S. App. D.C. 205, 349 F.2d 182).

2. The CSC has currently determined that—on the record presently before it—it cannot conclude that plaintiff meets the prescribed suitability and fitness standards for employment in the Federal competitive civil service; this decision is in compliance with the governing Court of Appeals' Mandate and the Order and Judgment pursuant thereto entered by this Court, and is otherwise in full accord with law.

Incorporated herein (and identified as indicated) are the following:

Government Exhibit	Description
"A-1"	Records relating to the current CSC proceedings and decision in plaintiff's case (attached)
"A"	Records relating to the original CSC proceedings and decision in plaintiff's case (previously filed in support of defendants' Motion for Summary Judgment)

"B" CSC statement of February 25, 1966 in respect of the unsuitability or unfitness for Government employment of persons who have engaged in homosexual acts (attached).

In support hereof, defendants submit a Memorandum of Points and Authorities.

WHEREFORE, defendants pray that plaintiff's motion to enforce judgment on mandate be denied; and that defendants' motion to affirm the current CSC decision in plaintiff's case be granted.

/s/ David G. Bress
United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Gil Zimmerman
Assistant United States Attorney

GOVERNMENT EXHIBIT "A-1"

FILE: INA:WNG:ad
DEC 3 1965

INFORMATION DISCLOSED BY
INVESTIGATION IN THE CASE OF

Bruce Chardon Scott

Please submit your explanation in the space provided for this purpose at the end of each matter presented below. Use additional sheets if more space is needed.

In your application for Federal employment dated October 3, 1961, filed under the Federal Administrative and Management Examination, you admitted that you had been arrested in 1957 for loitering, Washington, D. C., for which you for-

feited $5 collateral; and that you were arrested in 1951 in Washington, D. C., and that there were no charges and you were released.

With respect to your 1947 arrest, in an interview with a representative of the Commission on April 27, 1962, you executed a signed statement in which you commented on this arrest as follows:

> "At Lafayette Square men's room I was picked up by a police officer. After asking questions I would not answer, he had me charged with loitering. There was a man in the men's room who was behaving in an odd manner. I found I was unable to urinate and stepped outside to wait for him to come out. I went back in about ten minutes later and found this fellow was still in the men's room in the same odd position (leaning over the urinal with his hands propped against the wall.) The police officer followed me in and when I was leaving he said he wanted to talk to me. The police officer drove up in a Park Police cruiser when I was outside the men's room waiting for the other fellow to come out. He watched me for five minutes before I walked back in."

In connection with the above signed statement, in discussing this incident with the Commission representative you stated, "Although I zipped down after returning to the men's room I did not have an erection before the police confronted me." Although not denying the statement you declined to include it with your signed statement.

With respect to your 1951 arrest, the records of the Metropolitan Police Department reflect that Bruce Chardon Scott, born March 7, 1912, was arrested on October 3, 1951. The police records on you reflect the following report:

> "About 12:15 A.M. October 3, 1951, this man was observed standing over a white soldier in a door way on the 12th Street side of the Greyhound Bus station. What first drew our attention was the above man would look up and down the street as if to see

if anyone was coming, then he would run his hands around the soldier's pockets, at one time this man was in the doorway sitting with this soldier. The soldier was too drunk to be questioned at this time so he was turned over to the A.S.P.D. until he is sober enough to be questioned. Release at line-up if not wanted."

In your application you admitted that you had been discharged from employment with Fairfax County, Virginia. In this connection, Mr. James D. Keys, then Budget Research Director, Personnel Department, Fairfax County, Fairfax Virginia, furnished information to the Commission as follows:

"Bruce Scott was under my supervision from the time he came to work for Fairfax County in June of 1959 until he was dismissed in November of 1960. I employed Mr. Scott, but it was not a very good move on my part because he soon proved to be an 'odd-ball'. He did little things which I didn't expect of him and his manner of dress was rather sloppy. I sent him on an assignment to the Police Department to conduct an instruction course and after he finished I had several comments from various policemen which rather embarrassed me because they asked where I picked him up. He does not have any stand-out characteristics that would be considered as effeminate, but his thinking runs along lines which are not common in a man.

The dismissal of Bruce Scott came about through the discovery of an application which he submitted to Fairfax County for another position about one and a half years earlier. He was turned down on that job probably because he admitted an arrest at Washington, D. C., for loitering. On the application he submitted to me for his position he did not have this arrest and therefore I had to confront him on this matter. I asked him to give me the details of the arrest and he said that he was picked up for loitering at a D. C. comfort station. I had the Police Department of Fairfax County look into it and

they told me that he was at a New York Ave. and 12th St. N.W. bus station where he was taken into custody after picking up a soldier with whom he was leaving the station. The soldier was reportedly quite drunk. Later I confronted him directly with the question as to whether he was a homosexual and he said it was true. He then told me that he was perverted since he was a young boy. He also mentioned that he lived in Alexandria, Virginia, with an employee of the Government who he considered as his lover. He said that this period of time was one of the happiest in his life. He tried to talk me into keeping him on, but I immediately took action against him and also called the Big Brother organization which was allowing him to look after their boys. I personally recommended him for this when he first came to work for me on the basis of his previous service with the Labor Department where I called and received a very glowing testimonial from his supervisor.

I have never met any of Bruce Scott's friends. Here on the job he seemed to stay to himself. He generally had dirty clothes and his fingernails were always dirty. He handled his job all right, but his relations with fellow employees were not the best. He did make some comments which I ignored at the time, but later found them to fit quite well with a homosexual. To the best of my knowledge, he has no relations in this area. His mother is allegedly living in Chicago. He has a large home and since he left here I heard somewhere that he was having difficulty financing it. I know nothing about him which would cause me to question his honesty except for the falsified application. To the best of my knowledge, he is a loyal American. I would not recommend him for a position of responsibility and trust in the Federal Service because he is a homosexual."

The Fairfax County Virginia Police records reveal that on June 25, 1962, Officer Keillor was called to your home under the following circumstances, that one Manfred A.

Westerberger had picked up a hitch-hiking sailor, David L. Starkey, and driven him to your home at Lorton, Virginia. It was reported that Westerberger made an attempt to commit a homosexual act on Starkey but Starkey refused to permit the act and fled next door to the home of Loren Thompson. After Thompson called the police, Thompson, Officer Keillor, and Starkey went to your home where you were confronted with the above report. As a part of that confrontation, Thompson accused you, in the presence of Keiller and Starkey, of being a homosexual and of having committed homosexual acts. You neither admitted nor denied the accusations and made no answer or explanation.

You are being afforded this opportunity to make such comments or explanation of these matters as you deem necessary and appropriate. Your reply should be in writing and received in this office within fifteen (15) days from the date of receipt of this letter. If your reply is not received within the specified time a decision will be made on the basis of the information now of record. As a part of your reply you should specifically answer the following:

1. Do you deny any part of the reported circumstances of your 1947 arrest and your statements to a representative of the Commission?
2. Do you deny any part of the reported circumstances of your 1951 arrest?
3. Do you deny any part of the facts and circumstances reported in connection with your discharge by Fairfax County and the statements made to Mr. James D. Keys?
4. Do you deny any of the reported facts and circumstances of the interrogation conducted in your home on June 25, 1962, in the presence of Officer Keillor of the Fairfax County Police?
5. In view of the information which has been cited above, do you now deny that you have engaged in homosexual acts?

REPLY OF BRUCE CHARDON SCOTT
to the
UNITED STATES CIVIL SERVICE COMMISSION
STATEMENT OF

"INFORMATION DISCLOSED BY INVESTIGATION IN THE CASE OF BRUCE CHARDON SCOTT"

1.

The Civil Service Commission statement of "Information Disclosed by Investigation in the Case of Bruce Chardon Scott" includes the following items:

a. My statement April 27, 1962, to the Commission's investigator, Mr. T. T. Zubeck, concerning my arrest in September or October, 1947, for "loitering";

b. A statement imputed to me by Investigator Zubeck which it is alleged I did not deny but declined to include in my signed statement;

c. A quotation from the police record of my arrest for investigation by the Washington, D. C., Metropolitan Police Department, October 3, 1951;

d. A statement by Mr. James D. Keyes, my supervisor, when I was employed in the Budget and Personnel Division of Fairfax County, Virginia;

e. Information from the Fairfax County police records concerning an incident alleged to have occurred in my former home on Rolling Road, Springfield, Virginia, between one Manfred A. Westerberger and a hitchhiking sailor, David L. Starkey; and,

f. A request that I specifically answer the following five questions:

"(1) Do you deny any part of the reported circumstances of your 1947 arrest and your statements to a representative of the Commission:

"(2) Do you deny any part of the reported circumstances of your 1951 arrest?

"(3) Do you deny any part of the facts and circumstances reported in connection with your discharge by Fairfax County and the statements made to Mr. James D. Keys (sic)?

"(4) Do you deny any of the reported facts and circumstances of the interrogation conducted at your home on June 25, 1962, in the presence of Officer Keillor of the Fairfax County Police?

"(5) In view of the information which has been cited above, do you now deny that you have engaged in homosexual acts?

2.

With regard to the first four of the above questions, I deny in part and affirm in part the reported circumstances and statements, and, in an effort to establish a more accurate record, have set forth below in section 10 the facts as I recall them.

3.

With regard to the fifth question above, I respectfully must decline to answer for the following reasons:

a. The Civil Service Commission has not been granted authority by law or by its regulations to investigate the sex-lives of civil service applicants, and any such grant would be contrary to the right to privacy inherent in the Bill of Rights of the Constitution. This right to privacy may be invaded only when such invasion is justified by facts which, because of the individual needs of the people for a viable and enduring society, outweigh their individual rights to privacy.

b. Not only does the Civil Service Commission not have the authority to investigate the sex-lives of civil service applicants, but it has shown no need for the authority. It has adduced no evidence which shows a scientifically significant correlation between sex-life and job perform-

ance. Instead, it acts upon the basis of ancient Judeo-Christian religious dogma, unsubstantiated opinion, and prejudice. To the extent that the Commission acts upon the basis of unsubstantiated opinion and prejudice, it acts arbitrarily and capriciously.

c. To the extent that the Civil Service Commission discriminates against civil service applicants whose sex-lives it alleges do not conform to behavior dictated by ancient Judeo-Christian religious dogma, to that extent the Commission attempts to impose upon civil service applicants, regardless of their religious beliefs, a Judeo-Christian religious dogma, and to that extent to establish a state religion contrary to the First Amendment to the Constitution.

d. It is a fundamental principle of American constitutional law that all persons are equal before their Government and must be treated equally and uniformly. The Civil Service Commission does not treat all civil service applicants equally and uniformly when it singles out particular individuals, or a particular class of individuals, to investigate their sex-lives, and does not investigate the sex-lives of all civil service applicants.

4.

The Civil Service Commission may act only under authority of regulations prescribed by the President. The pertinent statute provides:

> "The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries . . . ." (United States Code, Title 5, sec. 631.)

Thus, to be within this authority, "regulations for admission of persons into the civil service" must be such as may best

(1) "promote the efficiency" of the civil service, and

(2) "ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service (class of positions) into which he seeks to enter."

Regulations, which will best promote the efficiency of the civil service, necessarily will be regulations that establish selection procedures which successfully discriminate between those civil servants who augment the efficiency of the service and those who diminish its efficiency.

The regulations must also be such as will provide for the best matching of civil service applicants to the classes of positions, for which they apply, with respect to the factors of "age, health, character, knowledge, and ability". However, personnel selection procedures which discriminate successful civil servants from unsuccessful civil servants should automatically select persons fitted for their jobs by reason of "age, health, character, knowledge, and ability".

5.

What may have been best twenty-five and fifty years ago is no longer best. In this day of scientific techniques for matching applicants and jobs, it is no longer sufficient for the Civil Service Commission, which should be a leader in the development of improved personnel selection techniques, to assert that a particular selection policy is valid and just without showing that it is so by facts democratically and scientifically ascertained—facts which demonstrate a significant correlation of particular education, training, experience, aptitudes, interests, temperaments, or behavior with efficient performance of particular jobs or classes of jobs. Any other procedure is arbitrary and capricious, based on unsubstantiated opinion and prejudice.

If the Commission is to inquire into the sex-lives of civil service applicants, it must show statutory authority for such inquiry and it must show that there is a significant correlation between sex-life and job performance.

6.

The Civil Service Commission is required by American constitutional law to treat all applicants equally and uniformly and may not discriminate for, or against, any applicant or group of applicants by arbitrarily singling out the applicant or group for prejudicial treatment. Inquiry into the sex-life of some applicants and not into the sex-life of all applicants is prejudicial because of the ignorance, misconceptions, and prejudices, concerning sexual behavior, which are rife among the Government and the people of the United States, just as to require an applicant to say what is his race, color, religion, or national origin may prejudice an appointing officer for or against his selection for a position.

There are no questions on Standard Form 57, "Application for Federal Employment", regarding sex-life, yet I and other persons are asked questions about my sex-life and the form required by the Commission to be attached to this, my answer, and to be signed by me, states that "the statements made by me are a continuation of statements made in my application for employment". The absence of sex-life questions from the standard Government employment application form indicates that all applicants are not asked these questions and that inquiry is not made into the sex-life of all applicants. This is not equal and uniform treatment under the law.

7.

The attitude of many people towards sexual behavior is determined by their religious beliefs and folklore and not from scientific knowledge about sexual behavior. In fact, their religious beliefs may inhibit them from obtaining such scientific knowledge.

The discrimination by the Civil Service Commission against what it calls "homosexual acts" or "homosexual conduct", but which it does not define or publish criteria for determining, derives from Judeo-Christian religious dogma through the Apostle Paul and so is an attempt to impose on, and conform all civil service applicants to these particular religious dogmas or beliefs, despite the First Amendment to the Constitution. Those persons, who are presently so intent in imposing their religious beliefs regarding sexual behavior upon non-believers, would be the first to scream violation of the First Amendment if any group attempted to impose upon them, and conform them to, the religious beliefs of the Greek philosopher, Plato, particularly as they are expressed in the Phaedrus and the Symposium.

The Commission undoubtedly does not accept the concepts of the ancient Hebrew prophets and the early Christian fathers concerning the structure and behavior of the physical universe, yet it accepts without question the concepts of these ancients about the behavior of men and disregards the present accumulation of scientific knowledge about animal and human behavior as well as the scientific techniques and resources for gaining further knowledge.

8.

In Anathematizing, in company with Hebrew and Pauline religious sects, and banning from the civil service, applicants whom it alleges to have engaged in what it terms "homosexual acts" or "homosexual conduct", the Civil Service Commission has confused its judicial and legislative functions. In promulgating through the President a regulation, or in establishing a policy, which affects civil service applicants, the Commission acts legislatively. In applying the regulation or the policy to a particular applicant, the Commission acts judicially.

Kenneth C. Davis in his textbook, Administrative Law and Government, has described the distinction as follows:

> "When a court or agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. When the court or agency develops law or policy, it is acting legislatively . . . .
>
> "Legislative facts are the facts which help the tribunal to exercise its judgment or discretion in determining what course of action to take."[1]

In applying its policy against so-called "homosexual conduct" to a civil service applicant, the Commission acts judicially and will have to support its action by facts which show that the applicant has engaged in what it defines as "homosexual conduct". However, in defining "homosexual acts" or "homosexual conduct" and in establishing a policy to bar from the civil service all applicants who have engaged in such acts or conduct, the Commission acts legislatively, and it must support this policy with legislative facts, something which it has not yet done.

The Congress of the United States does not enact legislation without accumulating, through the medium of committee hearings, a body of facts concerning the need for, and the probable effects of, the proposed legislation. The question here presented is whether the Civil Service Commission, the creature of the Congress, may legislate by issuing a regulation or instituting a policy, which affects the rights and privileges of citizens, without likewise accumulating a body of facts concerning the need for, and the effects of, the proposed regulation or policy.

9.

Because I believe that mankind will flower best under a democratically controlled government of delegated and limited powers; because I believe in the dignity and worth of all men, regardless of race, color, national origin, gender, sex-

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[1] Pp. 283, 284 (St. Paul: West Publishing Co., 1960).

ual orientation, preference, or nature, or any other diversity; because I believe that the purpose of each human being is to seek and become the person God or Nature created him to be; and, because I believe that that society is most likely to survive which tolerates the greatest variety of persons and ideas concordant with the maintenance of the society, just as that biological species, which has the greatest number of variant members, is most likely to adapt to, and survive, environmental changes, I cannot accede to a policy of any governmental agency which discriminates against any person or group because the behavior of the person or group offends many people, although the behavior does not interfere with, or injure, the rights of any person. The policy of the Civil Service Commission against which it terms "homosexual acts" or "homosexual conduct" is such a discriminatory policy.

10.

In the interest of making the record as accurate as possible, the facts of the incidents covered by the first four questions at the end of the Civil Service Commission's statement of the information allegedly disclosed by its investigation of me, so far as I can recall, are as follows:

a. My statement to Investigator T. T. Zubeck, April 27, 1962, despite its form recitation to the contrary, was not entirely "made of my own free will without any threat". The statement was a compromise between what I was trying to say and what the investigator wanted me to say. Not being fully informed of my rights, and because he kept asserting that I was being "uncooperative", I got the impression from him that I could be eliminated from the Federal Administrative and Management Examination on the ground that I was an uncooperative person. For this reason, I made every effort to cooperate with him.

We disputed over the wording of the statement for approximately three hours, perhaps a little longer. After the first hour, in addition to periodically accusing me of

being uncooperative, he also periodically reminded me that he had alloted only one hour for our interview and, by his manner, suggested that I was taking much too much time for a matter for which there could be only one outcome. Only when he realized that he had so abbreviated and garbled what I was trying to say that I could not possibly conscientiously sign the statement, did he tear up the most garbled portion and rewrite it somewhat more fully and somewhat more in accord with the facts.

In turn, I compromised and signed the statement solely because I feared the Commission might declare me ineligible for the Federal Administrative and Management Examination on the ground that an administrator or executive should be a cooperative person and, by refusing to sign the statement, I had shown myself to be an uncooperative person. Had I known that it would be the basic evidence in a court suit, I would never have signed it in the inadequate form that I did.

At least twice I requested permission to sit down at a typewriter in the office and type out my own replies to the investigator's questions ("Loitering" would never have become "lortering" in my statement, if I had!), but he refused permission and insisted that the statement had to be written by him, although it was to be signed by me.

b. A fuller and more accurate statement of the 1947 arrest follows.

One Saturday night in September or October of 1947, after eating dinner at the S & W Cafeteria between New York Avenue and G Street, I decided to walk to my home in Georgetown. Passing the Men's Room in Lafayette Square along H Street, I stopped in to urinate. A man was leaning over one of the urinals, his hand propped against the wall above the urinal in what appeared to be a strained and awkward position because of the distance his feet were back from the urinal. He continued in this position, and because his apparent unease and persistence

in the position puzzled me, I found myself unable to urinate. I, therefore, retired to the sidewalk along H Street and waited for the man to come out, so that I could go back in and accomplish my purpose.

While I was standing on the park curb along the H Street sidewalk, a police officer drove up in a Park Police cruiser and sat there. He watched me for five to ten minutes. I was unaware that I was violating any law, and he made no move to warn me that I was violating a law.

Eventually, it became embarassing with the police officer sitting there watching me, and so I went back into the Men's Room. The man was still there, leaning in the same awkward, strained position. I zipped down to urinate, but before I could even attempt to do so, I heard someone behind me. It was the officer from the Park Police cruiser.

I zipped up, turned, and walked out. The officer followed and said he wanted to talk with me. He led me around to the back of the building and took me into a combination office and storage room between the Men's and Women's Rooms. He sat down at the desk in the corner and proceeded to ask me questions which I turned aside or refused to answer.

He threatened me with arrest for loitering, and it angered him when I replied that if he felt I had in some way violated a law and that it was his duty therefore to arrest me, he should arrest me. He badgered me with more questions, and getting no or, to him unsatisfactory, answers, he led me outside to a police call box along H Street near 16th, called the Metropolitan Police, and had me booked for loitering.

I requested to go to court after posting $5 collateral, and a court date was set for the following week by the Desk Sergeant, but on the day set for my court appearance I became too busy and involved in my work to take time off, and so decided to let my collateral go, not realizing the implications of my not going to court to contest the charge.

c. The allegation by the Commission investigator, T. T. Zubeck, that I said: "Although I zipped down after returning to the men's room I did not have an erection before the police confronted me" is his interpretation of what I said, is garbled, and is out of context.

As I recall our discussion, I had raised a question with him concerning the copy of the statement by the arresting Park Police Officer to a Commission investigator during the routine civil service investigation of me in the autumn of 1955, which copy was made by a police officer of Fairfax County and shown to me by Mr. James D. Keyes when he requested me to resign from my position with Fairfax County, November 10, 1960. I had read the statement as saying that I had indecently exposed myself, and queried Mr. Zubeck as to how the officer could remember eight years afterwards what had happened and as to how he could say I had indecently exposed myself when my back was to him. I added that after I zipped up and turned around, it would have been plain to the officer that I did not have an erection.

Mr. Zubeck explained that the officer had not accused me of indecent exposure; that he had said that he did not remember the arrest but that often such arrests did involve indecent exposure. However, Mr. Zubeck apparently recorded my statement in the words quoted, although he is supposed to have destroyed the statement, because it is not what I said. The statement remains a good example of how my statements were garbled and distorted and of why I almost did not sign the statement as finally written by Mr. Zubeck. I would never have used the words "before the police confronted me", because "the police" never confronted me. One policeman, who had followed me into the Men's Room and then followed me out, merely said he wanted to talk with me. If that was "confrontation", it was confrontation by one policeman, not more.

d. The circumstances of my being held for investigation October 3, 1951, were as follows.

Walking up 12th Street to my car which was parked on H Street between 11th and 10th Streets, N.W., I noticed a soldier passed out in a side doorway of the Greyhound Bus Station. My immediate reaction was to arouse him and get him walking before the Armed Forces Police saw him and arrested him.

I reached into the doorway and shook him by his shoulders, but he did not respond. I then tried hitting the back of his neck with the edge of my hand. This not doing any good, I looked around for someone to help me lift him up and get him walking. There were people watching from across the street and a man standing about ten feet from me along the curb. I looked at him, and he looked back with a sort of a shrug of his shoulders as if to say, "What's the use?"

I again turned to the soldier and again hit hard the back of his neck several times with the edge of my hand. There was still no reaction. Again I looked around for someone to help me get him to his feet and walking, but the people watching from across the street and the man nearby made no move to be helpful.

I tried hitting the soldier some more on the back of his neck and slapping his face, but to no avail. No one came to help, and so I decided there was nothing more I could do for the fellow. I walked away to go to my car, but as I rounded the corner of the bus station, I was seized by the belt from behind by a police officer and tossed into a patrol wagon which had appeared out of nowhere. The officer at the same time grabbed my wallet from out of my back pocket, and it was not returned to me until I was released the next morning.

The officer came into the patrol wagon awhile later and questioned me as to how much money I had in my wallet. I could only guess that it was about $11. He got out, and I was taken to the First Precinct police station where I was put into a cell and held until morning. I was released then only after I insisted that I be allowed

to telephone my office so that inquiry could be made as to why I was being held.

Before I was released, I was fingerprinted and photographed. I asked the officer fingerprinting and photographing me whether this was an "arrest", and if so, what I was charged with. I explained to him that I was employed by the Federal Government and from time to time had to answer the question, "Have you ever been arrested?" He replied that this was not an arrest and, further, that I should not say anything about it "because most people would not understand."

However, I did discuss the incident with a fellow employee of the Department of Labor. His reaction was that if a police officer had said it was not an arrest, and if I had not been charged, I should forget about it.

The police report quoted about the incident is in error when it states that I sat in the doorway with the soldier and that I put my hands in his pockets. I did not sit with him and I did not put my hands in his pockets. There was no reason to do either.

e. The chain of events which led eventually to my dismissal from the position of Personnel Technician with Fairfax County, Virginia, began with my employment in the Trust Department of the American Security and Trust Company, Washington, D. C., in January, 1957.

About two weeks after my employment began, Mr. Donald Mowbray, a vice-president and personnel officer for the company, called me into his office. He told me that I had said on my application for employment that I had never been arrested, but that the bonding company had come up with "what looks like an arrest." I immediately recalled my attempt to save the drunken soldier from arrest back in 1951, and explained to him what had happened. I heard no more about the incident.

In the summer of 1957, I went to Mr. Mowbray to tell him that I had enrolled at George Washington Uni-

versity to work toward a Master of Arts degree in Personnel Administration and that I would be interested in being considered for any personnel opening the bank might develop. He asked me whether my supervisor, Mr. Albert Thompson, knew of this, and said I should tell Mr. Thompson because Mr. Thompson might have other plans for me.

I did tell Mr. Thompson, and a couple of weeks later when he realized I was looking around Washington for a personnel job, he asked me to resign not later than the end of October.

In November or early December, the Student Placement Office at George Washington University informed me that Fairfax County was looking for social case workers and that I could qualify. I went out to the Fairfax County Personnel Office and applied for the position. The application form had on it the two standard questtions: Have you ever been arrested? Omit traffic violations less than $25. Have you ever been requested to resign from any position?

I answered both questions "Yes", and set forth briefly the circumstances of being held for investigation in 1951 and Mr. Thompson's request that I resign from my position in the Trust Department of the American Security and Trust Company. I was interviewed by Mr. James D. Keyes, at that time Budget and Personnel Director for Fairfax County. He read my application no farther than my answers to these two questions, told me that I was not what the Directoress of the County Department of Welfare was looking for, and that if any other job developed for which I was qualified, he would notify me.

In February, 1959, I had an interview with my student advisor at George Washington University and he suggested that I should apply for the position of Personnel Technician which was open at Fairfax County. That same evening, the vacancy was announced in class by the professor. Notices of it were also posted on the University bulletin boards.

I called Mr. Mowbray at the American Security and Trust Company and told him that I intended to apply for the position, and asked whether, when inquiry was made about my employment with the bank, the bank would say that I had been requested to resign from my position there. He asked me to wait while he got and examined my personnel folder, and then answered that it was possible to get such an interpretation from the facts in the folder, but that he did not think the bank would so respond. When I applied for the position of Personnel Technician, I, therefore, answered the resignation question, "No."

With regard to the arrest question, I had not been charged when held for investigation in 1951, and there was disagreement among attorneys in the District of Columbia as to whether being held for "investigation" was an "arrest". Four years later, in 1963, the District Commissioners ruled that these were not arrests and ordered them to be expunged from the records.

So far as the loitering arrest in 1947 was concerned, I saw no difference from parking myself along the edge of a sidewalk, where I was not obstructing passers-by, and parking an automobile overtime on a street. The fine in each case was approximately the same, and very much less than $25. In addition, I had been living for about fifteen months, first on unemployment compensation and then on commission earnings from my job with Management Consultants, Inc., Washington, D. C., of about $30 per week in semi-starvation in a half-finished house, which I could not sell, and for several of these fifteen months without light, heat, and running water because I could not pay my electricity bill nor afford to pay for the repair of my water pump which had broken down.

In such penurious circumstances, I saw no reason to quibble about whether being held for investigation and not charged was an arrest, or whether a "loitering" arrest was technically different from a "parking" arrest, and so I answered the arrest question also, "No".

In April, 1959, sixteen or seventeen months after our first interview, Mr. Keyes again interviewed me, this time in his hotel room in Richmond, Virginia, during the conference of the Southern Division of the Public Personnel Association. The interview was conducted in the presence of the Personnel Director for the City of Winston-Salem, North Carolina. At the conclusion of the interview, Mr. Keyes told me I would soon hear from him about the competitive examination for the position.

This examination was given near the end of May and consisted of two parts: a written examination in the morning and a group oral examination in the afternoon followed by personal interview of each of the competitors by a special examining and rating board appointed by Mr. Keyes. The board, so far as I can recall the members, was composed of a Fairfax County department or bureau head, the Personnel Director for the City of Alexandria, the Assistant Personnel Director for the County of Arlington, either the Personnel Director for Montgomery County, Maryland, or a member of the Personnel Department of the District of Columbia (I do not remember which), and a George Washington University professor of public and personnel administration who had formerly been a personnel officer for one of the departments or agencies of the Federal Government. This last man presided over the board and, coincidentally, was the student advisor who had suggested that I apply for the position.

The group oral examination consisted of the competitors for the position sitting around a table and dealing, as a group, with a practical personnel problem assigned to it. The members of the rating board were distributed around the room to observe, make notes, and evaluate the interaction and the performance of each of the competitors.

I received the highest grade on the written examination and was rated highest by the special examining and rating board following its observance of my performance

during the group oral examination and its personal interview of me afterwards. The board did not know the grade of each competitor on the written examination and so could not be influenced in its independent evaluation of each competitor.

About a week later, early in June, 1959, Mr. Keyes called me in for an interview with Mr. Carlton Massey, the County Executive, and following this interview appointed me to the position of Personnel Technician with the approval of Mr. Massey. I served a probationary period of twelve months during which time Mr. Keyes could have dismissed me at will without giving any reason.

Late in September or in October, 1959, one of the staff members brought to me the application I had filed late in 1957 for the social case worker position, and said that the policy of the office was to destroy any application which was over six months old, but that the Chief Clerk thought, because I was now working for the Budget and Personnel Division, that the application should go into my personnel folder along with my application for the position I was now working in. I agreed and gave the application to the Chief Clerk.

A year later in October, 1960, a question of falsification of an employment application arose from another department, and although it was decided in that case there was no falsification, the Chief Clerk of the Budget and Personnel Division reiterated that there could be a question about my two applications and that I should discuss them with Mr. Keyes.

I did then tell him about the two applications and told him that he was free to have the Police Department inquire into the circumstances. He did, and the result is history.

f. The statement of Mr. Keyes, which the Commission had invited me to comment on, shows the tremendous power of stereotypes. It is not a statement he would

have made about me before the disclosure to him, through the Fairfax County Police Department, of extracts from the Civil Service Commission investigation file accumulated on me during the routine investigation of Department of Labor employees in the summer and fall of 1955.

In contrast to this statement by him, is his rating of me at the end of my probationary period in June, 1960, as more than satisfactory as an employee. This is attested by the fact that I received in that month a merit increase in pay which was granted only if an employee's job performance was rated above "satisfactory".

His statement is not only at variance with his rating of me in June, 1960, but with his statement about the "very glowing testimonial" he received from my supervisor for the last eight and one-half years I was employed by the Federal Government, a period of time very much longer than his sixteen months of association with me.

The inaccuracy of his recall of what was said, when he put before me the County Police Department copy of parts of the Civil Service Commission investigation file on me, is demonstrated by the variance of his statement from the Metropolitan Police Department record. Inaccurate as that record is, there is some excuse for inaccuracy because of darkness, the distance the police were from me, and the writing of the record by one of the arresting police officers from recall of the event approximately one-half hour or more after it occured.

I may well be an "odd-ball", as he has characterized me. If so, I am in good company because Albert Einstein, Albert Schweitzer, Thomas Edison, Mahatma Gandhi, Guatama Buddha, and other like them, have been called "odd-balls". Being only an average "odd-ball", I, of course, can only hope to, and never successfully, emulate such great "odd-balls".

Apparently the examining and rating board of five professional personnel officers and administrators, which

rated me after the group oral examination for the position of Personnel Technician, did not consider me to be an "odd-ball".

The seventeen years I was employed by the Federal Government, I avoided joining organizations, and so I cannot point during that time to any executive positions in any organization, but it may be to some extent pertinent to Mr. Keyes' description of me as an "odd-ball" to point out to the Commission that in high school I was president of the senior honorary society, vice-president of the senior class, editor-in-chief of the school weekly newspaper, co-editor of the school annual, president of my division room in my sophmore or junior year and again in my senior year. In college I was elected secretary of my Freshman Class, and in my sophmore or junior year was president of my dormitory. In the latter part of my senior year and the first part of my first year as a graduate student, I was an elected officer representing a student religious organization to the public. With the exception of the last position, this can all be verified by reference to the school annuals for those years.

I have never been able to afford Brooks Brothers or foreign import suits, but have always otherwise tried to be clean and neat in dress. Apparently, in the eyes of Mr. Keyes, I did not always succeed, although he never mentioned my clothes to me. We did discuss my finger nails, and his reference to "dirty finger nails" concerns the period of time when I was applying an asphalt emulsion to the roof decks of my house to waterproof them. Anyone who has worked with black asphalt paint knows how difficult it is to remove from one's hands and from under one's finger nails.

Mr. Keyes' reference to difficulty with the financing of my house is accurate. After one full year of unemployment following his dismissal of me, and then two years of under-employment, it is to be expected that I

would have financial difficulties, that I would lose the house and all that I had saved and invested in it, and end up with a large debt to relatives and friends who aided me through this impoverished and difficult time.

His characterization of my Alexandria, Virginia, apartment-mate as my "lover" is his own fantasy. The word has no precise meaning to me, and has connotations to other people which are incorrect. We were good friends who found it convenient to pool our resources in an apartment together, and we are still good friends.

Mr. Keyes is correct in describing my Alexandria residence as a happy period in my life. It was during that five-year period that I designed and drew the plans for my house, cleared the land, and plotted the topographical map required to be filed with the County along with my plans and application for a building permit. My apartment-mate was more social than I, and while his job required that he travel a great deal, when he was home he attracted other men and women and the apartment was alive with good companionship.

The assertion of Mr. Keyes that I told him I was perverted since a young boy is a misuse of the word "pervert" and is pure nonsense. The verb "pervert" derives from the Latin meaning "to turn thoroughly" and has come to mean "to turn aside or away from what is good or true or morally right".[2] Recognizing that the terms "good", "true", and "morally right" are value judgments which have no meaning apart from stated assumptions or defined standards, my standard has always been to seek and become whatever God or Nature created me to be, to be true to my real self, and not "to turn aside or away from" my real self—not to pervert myself into something I am not, as so many people try to do. Insofar as I have been true to my real self, I cannot be described as "perverted".

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[2] Webster's Seventh New Collegiate Dictionary (Springfield, Mass. G. & C. Merriam Co., 1965).

The conclusion of Mr. Keyes, "I would not recommend him for a position of responsibility and trust in the Federal Service because he is a homosexual" is circular and specious reasoning. The question of whether I am or am not a "homosexual", whatever the word means, is irrelevant to how I would conduct "a position of responsibility and trust in the Federal Service", is prejudicial, and, like all such references, should be expunged from my investigation file for the same reasons as if he had said I was a Democrat or a Republican, a Catholic or a Unitarian, a Caucasian or a Negro, a Chinese or a Russian.

g. Anent the Westerberger-Starkey incident, I had retired for the night when Westerberger and Starkey rang the frontdoor bell. Starkey was a musician and had expressed interest, according to Westerberger, in hearing my outmoded, but still excellent, "hi-fi" set and seeing the house because of the simple, but unusual, design which Westerberger had described to him.

Westerberger was a friend of a man who had helped me a great deal with the work on my house and had been to the house a few times before. After admitting him with Starkey, I left them to turn on the "hi-fi" and listen to phonograph records and to tour the house while I went back to bed and to sleep. I was almost immediately reawakened by Westerberger looking for Starkey who had disappeared.

The allegations are Starkey's and Loren Thompson's. If they are true, had I been awake and present, the incident would never have occurred. I would have supported Starkey in his justified objection and would immediately have taken him in my own car to his destination in Washington.

As to Thompson's attempt to pry into my sex-life, if I consider the matter to be no concern of the Civil Service Commission, I consider it to be even less the concern of anyone else.

It is interesting to note that Loren Thompson knew about my 1947 arrest. The only way he could have known about it was from the civil service investigator who interviewed him concerning me. This, along with the copy by the Fairfax County Police Department of parts of my civil service investigation file, suggests that the civil service files are not as confidential as the Commission insists.

11.

So that the record will not hang alone on one supervisor's description of me and be accordingly biased, I request the Civil Service Commission to introduce into the record the statements it has obtained from all others of my supervisors that its investigators have interviewed. This can be done without identifying the supervisors other than to state the length of their acquaintance with my work.

Each of the above pages, containing my comments concerning the matters referred to in the Commission's letter of December 3, 1965, has been initialed by me. I am aware that the statements made by me are a continuation of statements made in my application for employment in this position and that false statements are punishable by law.

/s/ BCS
December 20, 1965

UNITED STATES CIVIL SERVICE COMMISSION
Bureau of Personnel Investigations
Washington, D. C. 20415

INA:HCB:ad

March 11, 1966

Dear Mr. Scott:

This refers to the applications for federal employment that you have on file with the Civil Service Commission. On October 3, 1961, you filed an application for positions to be filled through a competitive civil service examination known as the Federal Administrative and Management Examination (FAME, Ann. No. U-167). On November 13, 1961, you filed an application for positions of Personnel Officer, Placement Officer, Position Classifier, and Employee Relations Officer (Ann. No. 103). On March 20, 1962, you filed an application for Management Analyst (Ann. No. 103). More recently, on October 8, 1965, you filed a new application in the FAME examination for positions at the GS-13, $12,510 per annum, level. In addition, on October 8, 1965, you filed applications for Management Analyst, GS-9, GS-11, salary $7479 and $8961 respectively, and for Personnel Officer and Placement Officer, GS-9, salary $7479. The aforementioned applications filed by you in 1965 were for the purpose of bringing your previous work experience up to date.

In view of the fact that your application of October 3, 1961, disclosed that you had been dismissed from employment with Fairfax County, Virginia, in November 1960 and that you had been arrested in Washington, D. C., in 1947 and 1961, it was necessary for the Civil Service Commission to conduct a personal investigation in order to resolve any question as to your fitness for employment in the competitive civil service. In connection with this investigation you were afforded a personal interview with a Commission representative on April 27, 1962, and were afforded an opportunity to comment and to furnish any information or explanation you wished to offer with respect to the in-

formation obtained by the Commission as a result of its investigation of your case. The aforementioned interview was recorded by the Commission and you were furnished with a copy.

As a result of your applications of October 8, 1965, referred to above, the Commission conducted another investigation to determine your fitness for employment in the competitive civil service. By letter of December 3, 1965, the matter concerning your arrest record and your discharge from employment with Fairfax County, Virginia, were presented to you for your comments or explanation. In addition, you were asked to comment on an incident that took place in your home in Virginia on June 25, 1962, which necessitated a report to the Fairfax County police department. In the letter of December 3, 1965, referred to above, you were furnished the complete statement of Mr. James D. Keyes, Budget Research Director, Personnel Department, Fairfax County, Virginia, wherein he states that in late 1960 he confronted you directly with the question as to whether or not you were a homosexual and that you admitted that you were, that you have been perverted since you were a young boy, and that you resided with a person in Alexandria, Virginia, whom you characterized as your "lover." In addition, you were furnished with a summary report of your arrest of 1951 from the files of the Metropolitan Police Department, your statement of April 27, 1962, to a Commission representative with respect to your arrest of 1947, and a summary of the incident of June 25, 1962, referred to above. You submitted your answer and comments to the Commission's letter of December 3, 1965, on December 20, 1965.

The Civil Service Act, section 1753 of the Revised Statutes (5 U.S.C. 631), and the Civil Service Rules and Regulations promulgated under these authorities govern the admission of persons into the civil service of the United States and require the Civil Service Commission to determine the fitness of each candidate in respect to character, among other things. These authorities also provide for appropriate inves-

tigation by the Commission and require an applicant, on request of the Commission, to furnish information in his possession necessary to enable the Commission to make a determination of his character and fitness. (5 CFR 5.3) Reasons which may disqualify an applicant from competing in examinations are listed in Part 731 of the Commission's regulations (5 CFR 731.201). Among the reasons upon which disqualification may be based are the following:

> "(b) Criminal, infamous, dishonest, immoral or notoriously disgraceful conduct."

The results of investigation in your case have been carefully considered, as have your statements in the interview on April 27, 1962, and your letter of December 20, 1965. Consideration has also been given to your refusal to comment or to furnish information as to whether or not you have engaged in homosexual acts, and to your failure to deny the admissions made by you, as reported by Mr. Keyes, during the course of his conversation with you in 1960. These matters are pertinent to a determination of your fitness. Accordingly, in light of the investigation and your failure to respond to the question as to whether or not you have ever engaged in homosexual acts, as well as your failure to give a satisfactory explanation of the derogatory evidence adduced by the investigation, I am unable to conclude that you meet the standards of fitness for employment in the competitive federal service. Therefore, the applications under consideration for employment are rated ineligible.

You are privileged to appeal this decision. Such appeal, if made, should be in writing and must be received in this office within fifteen (15) days after receipt of this letter and should include any new or additional facts which you feel would warrant further review of your case.

Sincerely yours,

H. C. Bolton, Chief
Division of Adjudication

23 March 1966

Mr. H. C. Bolton, Chief
Division of Adjudication
Bureau of Personnel Investigations
United States Civil Service Commission
Washington, D. C., 20415

Dear Mr. Bolton:

I hereby appeal your ruling in your letter of 11 March 1966 that my applications for the Federal Civil Service are rated ineligible on the ground that I am unsuitable for such employment, and request permission for my attorney, David Carliner, Counselor at Law, Warner Building, Washington, D. C., 20004, to appear before the appropriate officer or agency of the Civil Service Commission to argue orally the grounds for this appeal.

If this request for oral argument is denied, in the alternative I request an extension of time in which to submit written arguments in support of this appeal.

I also request clarification of the ruling. Does the ruling permanently bar me from the Federal Civil Service or only for another three years? Or does the ruling not bar me at all, but is a simple ruling of ineligibility for these particular examinations which leaves me free to file new applications for these and other examinations for which my training and experience may qualify me in the future? Further, what is the effect of the ruling on my re-employment rights?

Please notify David Carliner, Esq., directly, with a copy to me, of the time and place for oral argument, if permission for such argument is granted.

Very truly yours,

Bruce C. Scott

WASSERMAN & CARLINER
Counselors at Law
Warner Building
Washington 4, D. C.

May 3, 1966

Mr. Woodrow L. Browne, Deputy Director
Bureau of Personnel Investigations
United States Civil Service Commission
1900 E Street, Room 3609
Washington, D. C. 20415

Re: BRUCE C. SCOTT

Dear Mr. Browne:

In accordance with our understanding at the time of my appearance before you on April 7, 1966, I am writing to reduce to writing the grounds for the appeal from the decision of the Chief of the Division of Adjudication that Mr. Bruce C. Scott's applications for employment in the competitive civil service are rated ineligible.

It is our position that the present proceedings of the Civil Service Commission must be in compliance with the mandate of the United States Court of Appeals for the District of Columbia in *Bruce C. Scott v. John W. Macy, et al.*, which requires that the Commission "specify the conduct which it finds 'immoral'."

None of the specifications contained in the Notice of December 3, 1965 to Mr. Scott contains a charge of "immoral conduct."

1. The first specification relates to an arrest in 1947 for "loitering" at a men's room in the District of Columbia. None of the information set forth in this matter—either the fact of the arrest or the circumstances surrounding the arrest—disclose any evidence of immoral conduct. The sole charge against Mr. Scott is "loitering", which is plainly not "immoral". The only adverse implication in the specification is a statement that Mr. Scott did not deny making a statement that "although I zipped down after returning to

the men's room I did not have an erection before the police confronted me", but that he "declined to include it with (his) signed statement." Whatever this may mean it is not a specification of immoral conduct. In the light of Mr. Scott's unrebutted charge that there was dispute between him and the Civil Service Commission investigator regarding the wording of the statement, and in the light of Mr. Scott's full explanation of the circumstances of the arrest, no reliance should be placed on the circumstances of the arrest by the Civil Service Commission for determining Mr. Scott's eligibility for employment.

2. The second specification relates to an arrest upon no charge on October 3, 1951. Nothing in the charge suggests "immoral conduct." The police records, upon which the Division of Adjudication relies, indicate only that Mr. Scott was to be "released at line-up if not wanted." Mr. Scott's explanation, which is unrebutted, indicates that at the time of his arrest, he was attempting solely to arouse and to help a soldier who had passed out from being drunk. No reliance should be placed upon this episode in determining Mr. Scott's eligibility for employment.

3. The third specification relates to Mr. Scott's discharge by Fairfax County, Virginia, to characterizations made of Mr. Scott by a former supervisor and to admissions of homosexuality alleged to have been made to the supervisor by Mr. Scott.

The discharge itself suggests no "immoral conduct", being based upon Mr. Scott's failure to list the arrests referred to in the earlier charges. The supervisor's description of Mr. Scott as an "odd-ball", as one "who does not have any standout characteristics that would be considered effeminate . . . (but whose) . . . thinking runs along lines which are not common in a man", whose "comments fit quite well with a homosexual" are highly subjective and are evidence only of the supervisor's attitudes rather than of any conduct by Mr. Scott.

The statement that Mr. Scott told the supervisor that he

"was a homosexual", that he "was perverted since he was a young boy", that he lived with an employee of the Government (sex and marital status unspecified) who he considered as his "lover", even if true, do not meet the requirements of the Court of Appeals mandate that the homosexual conduct itself be specified. "The Commission may not rely on a determination of 'immoral conduct' based only on such vague labels as "homosexual" and "homosexual conduct." (Slip opinion p. 7).

In any event, the statements attributed to the supervisor are inherently incredible in the context of Mr. Scott's statements and steadfast position that his sexual life is a matter of his personal privacy, and his view that homosexual conduct cannot be regarded as "perverted" but must be viewed in terms of whatever "God or Nature has created him to be."

The supervisor's statement that Mr. Scott is "homosexual" stands on no better footing than the Civil Service Commission's original allegation.

The information contained in the third specification does not form a basis for determining that Mr. Scott has engaged in immoral conduct.

4. The fourth specification relates to an allegation that one, Westerberger, attempted to commit a homosexual act upon one, Starkey, in Mr. Scott's house. There is no suggestion that Mr. Scott participated in the alleged attempt, that he was present, or was even aware of the episode at the time. The sole circumstance in the episode which relates to any conduct on the part of Mr. Scott is that "he neither admitted nor denied" charges by a neighbor that "he was a homosexual" and had "committed homosexual acts" and that he "made no answer or explanation." Nothing in this specification evidences any immoral conduct on the part of Mr. Scott.

5. The fifth specification is Mr. Scott's "failure to respond to the question as to whether or not (he has) ever

engaged in homosexual acts." This specification is clearly precluded in view of the Court of Appeals decision in Mr. Scott's case.

Apart from the above grounds, all of which relate expressly to the original information furnished to Mr. Scott on December 3, 1965, we raise the following additional grounds for reversing the decision of the Chief of the Division of Adjudication:

6. The finding set forth in the letter of the Chief of the Division of Adjudication of March 11, 1965, that Mr. Scott has failed to give "a satisfactory explanation of the derogatory evidence adduced by the investigation" is capricious and arbitrary. For the reasons given above, none of the evidence is "derogatory" within the meaning of the requirements of the Court of Appeals decision. But apart from this issue, Mr. Scott has in each instance given full and detailed explanations regarding each episode. A finding that the explanations are not "satisfactory" is conclusory and fails to indicate the basis upon which the finding is made.

7. The finding is conflict with the statement of policy of the Civil Service Commission set forth in a letter from Chairman John W. Macy, Jr. to the Mattachine Society of Washington, dated February 25, 1966. The letter states that the considerations deemed pertinent by the Commission "encompass the types of deviate sexual behavior engaged in, whether isolated, intermittent, or continuing acts, the age of the particular participants, the extent of the promiscuity, the aggressive or passive character of the individual's participation, the recency of the incidents, the presence of physical, mental, emotional or nervous causes . . . the public or private character of the acts" as well as others. None of these considerations is reflected in the finding by the Division of Adjudication. One of the factors, "recency of the incidents", has been clearly disregarded inasmuch as two of the episodes relied upon relate to conduct; in one instance, 19 years ago, and in the other instance approximately 15 years ago.

8. The prior decision of the Civil Service Commission ruled upon the basis of the identical evidence now before the Commission that Mr. Scott would be barred from eligibility for employment for a period of three years. None of the charges against Mr. Scott relate to any conduct during the interval which has passed. Absent any charges of offending conduct in the intervening period, the Commission may not properly rely upon the earlier charges to continue Mr. Scott's bar to employment.

For the reasons set forth above, the decision by the Division of Adjudication should be reversed and Mr. Scott should be rated eligible for employment in the competitive civil service.

Very truly yours,

David Carliner

UNITED STATES CIVIL SERVICE COMMISSION
Bureau of Personnel Investigations
Washington, D. C. 20415

INA:INV
May 5, 1966

Dear Mr. Scott:

This is in reference to your appeal from the decision of the Division of Adjudication that your applications for Federal employment, under consideration at that time, had been rated ineligible.

Careful consideration has been given to your appeal and the record in your case, including the oral and written representations by your attorney, Mr. David Carliner. The derogatory information obtained during the investigation which

was communicated to you for rebuttal, explanation, or clarification, has not been adequately resolved by any information furnished by you or your counsel so as to enable me to make a finding that you are suitable. Consequently, it is the decision of this office that the previous action in your case was required under the facts and circumstances pertaining to a determination of suitability and, therefore, that action is affirmed.

This decision may be appealed further to the Commission's Board of Appeals and Review. Such appeal should be submitted to this office so that the complete file can be forwarded to the Board of Appeals and Review. No further appeal will be accepted unless it is received in this office within seven days from the date of receipt of this letter.

Sincerely yours,

Kimbell Johnson
Director

May 6, 1966

Mr. Kimbell Johnson, Director
Bureau of Personnel Investigations
United States Civil Service Commission
Washington, D. C. 20415

Re: Bruce C. Scott, INA:INV

Dear Mr. Johnson:

This will acknowledge your letter of May 5, 1966, addressed to Bruce C. Scott.

This is to appeal the decision of the Bureau of Personnel Investigations to the Commission's Board of Appeals and Review.

Very truly yours,

David Carliner

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C. 20415

BAR:lr

June 22, 1966

Dear Mr. Carliner:

Further reference is made to your letter dated May 6, 1966, submitting an appeal on behalf of Mr. Bruce C. Scott, 1400 East 53rd Street, Chicago, Illinois, from the decision of the Director, Bureau of Personnel Investigations in Mr. Scott's case. That decision affirmed the previous action of the Chief, Division of Adjudication, wherein Mr. Scott was advised by letter dated March 11, 1966 that the applications for Federal employment filed by him had been rated ineligible.

In his letter to Mr. Scott dated May 5, 1966, the Director, Bureau of Personnel Investigations informed Mr. Scott that the derogatory information obtained during the investigation which was communicated to him for rebuttal, explanation or clarification, had not been adequately resolved by any information furnished by him or his counsel so as to enable the Director to make a finding that Mr. Scott was suitable. Consequently, it was the decision of the Director's office that the previous action in Mr. Scott's case was required under the facts and circumstances pertaining to a determination of suitability and, therefore, that action was affirmed.

The Board of Appeals and Review has carefully reviewed the complete appeal file in Mr. Scott's case pursuant to the appeal submitted by you to the Board on his behalf in your letter dated May 6, 1966. Based on that review, the Board concurs in the decision of the Director, Bureau of Personnel Investigations as communicated to Mr. Scott by letter dated May 5, 1966. Accordingly, the previous decision communicated to Mr. Scott under the above date is affirmed by the Board of Appeals and Review.

For the Commissioners:

Sincerely yours,

E. T. Groark
Chairman, Board of
Appeals and Review

June 24, 1966

Honorable John Macy
Chairman
Civil Service Commission
Washington, D. C. 20415

Dear Mr. Macy:

Reference is made to a decision of the Board of Appeals and Review dated June 22, 1966 in connection with the case of Bruce C. Scott.

It is requested that the case be reviewed by the Civil Service Commissioners. Grounds for the appeal are set forth in a letter addressed to Mr. Woodrow L. Browne of May 3, 1966. I am enclosing a copy of that letter at this time.

Very truly yours,

David Carliner

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C. 20415

Sept. 13, 1966

Mr. David Carliner
Counselor at Law
Warner Building
Washington, D. C.

Dear Mr. Carliner:

Further reference is made to your letter dated June 24, 1966 to Chariman Macy, requesting that the Commissioners review the case of Mr. Bruce C. Scott.

The Commissioners have made a full review of the file in this case, including all representations submitted by you on behalf of Mr. Scott. The Commissioners find that, on the basis of the information presented to the Commission, the previous decisions of the Bureau of Personnel Investigations

and the Board of Appeals and Review, rating Mr. Scott ineligible on suitability and cancelling his applications and eligibilities, were warranted; and that there is insufficient justification in the current representations for a reversal or modification of the previous decisions.

By direction of the Commission:

Sincerely yours,

Mary V. Wenzel
Executive Assistant
to the Commissioners

GOVERNMENT EXHIBIT "B"

UNITED STATES CIVIL SERVICE COMMISSION
Washington, D. C. 20415

February 25, 1966

The Mattachine Society
of Washington
P. O. Box 1032
Washington, D. C. 20013

Gentlemen:

Pursuant to your request of August 15, 1965, Commission representatives met with representatives of the Society on September 8, 1965, to enable the Society to present its views regarding the Government policy on the suitability for Federal employment, of persons who are shown to have engaged in homosexual acts.

The Society was extended 30 days to submit a written memorandum in support of the positions set forth at these discussions to ensure that full consideration could be given to

its contentions and supporting data by the Commissioners. On December 13, 1965, the Society filed five documents,[1] which, along with the substance of the September discussions, have been considered by the Commissioners.

The core of the Society's position and its recommendations is that private, consensual, out-of-working hours homosexual conduct on the part of adults, cease to be a bar to Federal employment. In the alternative it is asked that the Commission activate continuing discussions with representatives of the Society to take a "progressive, idealistic, humane, forward-looking, courageous role" to elicit the holding of objective hearings leading to the adoption of the Society's recommendation.

The Commission's policy for determining suitability is stated as follows:

> "Persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual or sexually perverted acts with them, without evidence of rehabilitation, are not suitable for Federal employment. In acting on such cases the Commission will consider arrest records, court records, or records of conviction for some form of homosexual conduct or sexual perversion; or medical evidence, admissions, or other credible information that the individual has engaged in or solicited others to engage in such acts with him. Evidence

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[1] "DISCRIMINATION AGAINST THE EMPLOYMENT OF HOMOSEXUALS, dated February 28, 1963, by the Society, "RESOLUTION OF NATIONAL CAPITOL AREA CIVIL LIBERTIES UNION ON FEDERAL EMPLOYMENT OF HOMOSEXUALS", dated August 7, 1964, "A BRIEF OF INJUSTICES" by the Council on Religion and the Homosexual, Inc., San Francisco, California, June 1965, "WHY ARE HOMOSEXUALS PICKETING THE U. S. CIVIL SERVICE COMMISSION", June 26, 1965, by the Society, and "FEDERAL EMPLOYMENT OF HOMOSEXUAL AMERICAN CITIZENS", November 15, 1965, by the Society.

showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct."

We have carefully weighed the contentions and recommendations of the Society, and perceive a fundamental misconception by the Society of our policy stemming from a basic cleavage in the perspective by which this subject is viewed. We do not subscribe to the view, which indeed is the rock upon which the Mattachine Society is founded, that "homosexual" is a proper metonym for an individual. Rather we consider the term "homosexual" to be properly used as an adjective to describe the nature of overt sexual relations or conduct. Consistent with this usage pertinent considerations encompass the types of deviate sexual behavior engaged in, whether isolated, intermittent, or continuing acts, the age of the particular participants, the extent of promiscuity, the aggressive or passive character of the individual's participation, the recency of the incidents, the presence of physical, mental, emotional, or nervous causes, the influence of drugs, alcohol or other contributing factors, the public or private character of the acts, the incidence of arrests, convictions, or of public offense, nuisance or breach of the peace related to the acts, the notoriety, if any, of the participants, the extent or effect of rehabilitative efforts, if any, and the admitted acceptance of, or perference for homosexual relations. Suitability determinations also comprehend the total impact of the applicant upon the job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth,

and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

In the light of these pervading requirements it is upon overt conduct that the Commission's policy operates, not upon spurious classification of individuals. The Society apparently represents an effort by certain individuals to classify themselves as "homosexuals" and thence on the basis of asserted discrimination to seek, with the help of others, either complete social acceptance of aberrant sexual conduct or advance absolvement of any consequences for homosexual acts which come to the attention of the public authority. Homosexual conduct, including that between consenting adults in private, is a crime in every jurisdiction, except under specified conditions, in Illinois. Such conduct is also considered immoral under the prevailing mores of our society.

We are not unaware of the numerous studies, reports and recommendations pertaining to the criminal aspects of aberrant sexual conduct and the unequal and anomalous impact of the criminal laws and their enforcement upon individuals, who for whatever cause, engage in homosexual conduct.[2]

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[2] e.g. SEX OFFENDERS, Gebhard, Gagnon, Pomeroy, Institute of Sex Research (1965); SEXUAL BEHAVIOR AND THE LAW, Samuel G. Kling, Random House (1965); HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA, Legislative Investigation Committee Report (1964); THE AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Proposed Official Draft (1962); PRIVATE CONSENSUAL HOMOSEXUAL BEHAVIOR: THE CRIME AND ITS ENFORCEMENT, Yale Law Journal, 623 (March 1961); REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT AND THE SECRETARY OF SCOTLAND (WOLFENDEN REPORT) (1957); A PSYCHIATRIC EVALUATION OF LAWS OF HOMOSEXUALITY, 29 Temple Law Quarterly, 273 (Spring 1956) and SEXUAL DEVIATION RESEARCH, Calif. Legislature, Judiciary Committee, Subcommittee on Sex Research (1952).

It is significant to note, however, that the renowned Wolfenden Report, which recommended that consensual homosexual conduct, in private between persons over 21 years of age, be excluded as an offense under the criminal law of England, nevertheless recognized that such conduct may be a valid ground for exclusion from certain forms of employment. *id* p. 22. Whether the criminal laws represent an appropriate societal response to such conduct is a matter properly addressed to the state legislatures and the Congress. It is beyond the province of this Commission.

We reject categorically the assertion that the Commission pries into the private sex life of those seeking Federal employment, or that it discriminates in ferreting out homosexual conduct. The standard against criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct is uniformly applied and suitability investigations underlying its observance are objectively pursued. We know of no means, consistent with American notions of privacy and fairness, and limitations on governmental authority, which could ascertain the nature of individual private sexual behavior between consenting adults. As long as it remains truly private, that is, it remains undisclosed to all but the participants, it is not the subject of an inquiry. Where, however, due to arrest records, or public disclosure or notoriety, an applicant's sexual behavior, be it heterosexual or homosexual, becomes a matter of public knowledge, an inquiry may be warranted. Criminal or licentious heterosexual conduct may equally be disqualifying, and like homosexual conduct, may become the subject of legitimate concern in a suitability investigation. In all instances the individual is apprised of the matter being investigated and afforded an opportunity to rebut, explain, supplement or verify the information.

To be sure if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences, as some members of the Mattachine Society openly avow, the Commission would be required to find such an

individual unsuitable for Federal employment. The same would be true of an avowed adulterer, or one who engages in incest, illegal fornication, prostitution, or other sexual acts which are criminal and offensive to our mores and our general sense of propriety. The self-revelation by announcement of such private sexual behavior and preferences is itself public conduct which the Commission must consider in assaying an individual's suitability for Federal employment.

Hence it is apparent that the Commission's policy must be judged by its impact in the individual case in the light of all the circumstances, including the individual's overt conduct. Before any determination is reached the matter is carefully reviewed by a panel of three high level, mature, experienced employees, and all factors thoroughly considered. The fairness of this result, in the light of the investigative evidence including the applicant's statements, is subject to administrative review and may also be judicially reviewed. Hence there are safeguards against error and injustice.

We can neither, consistent with our obligations under the law, absolve individuals of the consequences of their conduct, nor do we propose by attribution of sexual preferences based on such conduct, to create an insidious classification of individuals. We see no third sex, no oppressed minority or secret society, but only individuals; and we judge their suitability for Federal employment in the light of their overt conduct. We must attribute to overt acts whether homosexual or heterosexual, the character ascribed by the laws and mores of our society. Our authority and our duty permit no other course.

By direction of the Commission:

Sincerely yours,

John W. Macy, Jr.
Chairman

EXCERPTS FROM THE PROCEEDINGS

[58] THE COURT: Gentlemen, it seems to me that in view of the letter Mr. Scruggs, Chief of the Professional Examining Section, sent to Mr. Scott, dated October 15, 1965, and the administrative proceedings that followed thereafter, that the Civil Service Commission has met the mandate and followed the mandate of the Court of Appeals in this matter. Therefore, I will deny the plaintiff's motion to enforce the judgment on [59] the mandate.

Now, addressing myself to the oral complaint for declaratory judgment and review of determination of suitability for Federal employment, based on the second hearing before the Civil Service Commission which occurred after the mandate of the Court of Appeals, and addressing myself to the plaintiff's oral motion for summary judgment on that oral complaint, and the defendant's oral motion for summary judgment based on that oral complaint, this Court holds that the Government has a right to consider a person who actively engages in homosexuality as unfit for Federal employment.

Further, as to this particular case, the Court holds that the action of the Civil Service Commission, as shown by substantial evidence, that it was not arbitrary and capricious for the following reasons: That the Civil Service Commission in the enclosure to its letter of December 3, 1965 to the plaintiff, gave the plaintiff certain specific information as to an investigation of his case by the Commission, and that the first four of the matters set forth on Page 4, the last page thereof, together with the information that went before, was such as to reasonably notify the plaintiff of the information that the Government [60] had which justified the Government thinking that there was probable cause to believe that the plaintiff had engaged and was engaged in homosexual acts; and it justified the Government in item 5 on Page 4, which says:

"In view of the information which has been cited above, do you now deny that you have engaged in homosexual acts?"

The Court feels that in view of the investigation which the Government made, and which had disclosed in its information and investigation dated December 3, 1965 to Mr. Scott, that the Government was then justified in asking that question which I have just quoted.

The Court further holds that the replies of the plaintiff to the first four of the items set forth on Page 4 of the matter just referred to, plus the fact that the plaintiff simply refused to answer outright the question No. 5 put on Page 4 of that document, justified the Government in finding that the plaintiff was not fit for employment by the Government.

Now, Mr. Carliner, do you think in order to properly present this matter to the Court of Appeals it is necessary for me to remark on any other facet of the case?

MR. CARLINER: I don't believe so, Your Honor. [61] Unless Mr. Zimmerman has something, if Your Honor will ask him.

What I would like to be certain is included as part of our oral complaint and oral motion for summary judgment are the grounds for the appeal which we had filed before the Civil Service Commission, and I assume that Your Honor's ruling covers an adverse ruling on each of those grounds. They are all set forth.

THE COURT: My ruling does so.

Do you have anything further to suggest, Mr. Zimmerman?

MR. ZIMMERMAN: Yes, Your Honor. I merely wish to point out that when Your Honor stated that the Civil Service Commission found him unfit, that this is not what they did, they found that they could not find that he was fit.

Your Honor may feel this is a distinction without impor-

tance, but at least for the record I should like to have it reflect that is the particular finding they made.

THE COURT: That is correct, and we may amend that to say I think they were justified in saying they could not find that he was fit.

Therefore, the Court will deny the plaintiff's [62] oral motion for summary judgment on the oral motion for declaratory judgment, and will grant the Government's motion for summary judgment.

STIPULATION

WHEREAS, at the commencement of the hearing held in this cause on January 6, 1967, an oral stipulation was entered into by counsel for the parties, and approved by the Court; and, upon conclusion of the hearing and entry by the Court of an oral decision disposing of all issues presented in this litigation, it was directed by the Court that the said oral stipulation by the parties be reduced to writing and incorporated into the record in this cause, prior to entry by the Court of its final disposition of the case,

It is hereby stipulated and agreed by counsel for the parties:

1. That the Court had before it for appropriate disposition at the January 6, 1967 hearing plaintiff's "Motion to Enforce Judgment on Mandate" and defendants' Opposition thereto;

2. That at such January 6, 1967 hearing plaintiff, without prejudice to his said motion:

a. Orally amended his complaint, to add a "Second Cause of Action", seeking a declaratory judgment that the proceedings conducted, and the decision reached, by the Civil Service Commission, following entry by this Court on September 15, 1965 of its Order and Judgment under the deci-

sion of the Court of Appeals of June 10, 1965 (reported 121 U.S. App. D.C. 205, 349 F.2d 182), are invalid and not in accord with law; and

b. Orally moved the Court to grant summary judgment in his favor on such "Second Cause of Action".

3. That at such January 6, 1967 hearing defendants orally amended their "Motion to Affirm Current Civil Service Commission Decision" to constitute a cross-motion for summary judgment in their favor on plaintiff's "Second Cause of Action", on the ground that the challenged proceedings conducted, and the decision reached, by the Civil Service Commission, following entry by this Court of its September 15, 1965 Order and Judgment, are valid and in accord with law.

4. That it was the intent of the parties, acted on by the Court, at the January 6, 1967 hearing, to have the Court now dispose of all issues presented in this case.

5. That it was the view of the parties, acted on by the Court, at the January 6, 1967 hearing, that the issues presented for determination by the Court, in respect of plaintiff's oral "Second Cause of Action", are as follows:

a. Whether it was arbitrary or capricious for the Commission, considering the specific "information disclosed by investigation" set forth in the statement attached to its letter of December 3, 1965 to plaintiff, and in light of its announced policy determinations concerning the unsuitability for Federal employment of persons who have engaged in homosexual acts under the circumstances stated in its letter of February 25, 1966 (Government Exhibit B), to require plaintiff to respond to the five queries posed at the end of the statement attached to the Commission's letter of December 3, 1965?

b. Whether, as a matter of law, the Commission is correct in concluding that such homosexual conduct as it states in Government Exhibit B will, without evidence of rehabilitation, render a person unsuitable for Federal employment

under 5 C.F.R. 731.201 as one who has engaged in "criminal" or "immoral" conduct?

c. If the Commission's actions under (a) and (b) above are sustained as being in accord with law, whether, in any way not encompassed by (a) or (b), it was arbitrary or capricious for the Commission to conclude (i) that, in light of the specific "information disclosed by investigation" in plaintiff's case, his refusal to comment or to furnish information as to whether or not * * * [he had] * * * engaged in homosexual acts", and his "failure to deny the admissions * * * [he had reportedly made to] * * * Mr. Keyes * * * in 1960", were "pertinent to a determination [by the Commission] of * * * [his] * * * fitness" for Federal employment, and (ii) that, in light of the investigation and * * * [plaintiff's] * * * failure to respond to the question as to whether or not * * * [he had] * * * ever engaged in homosexual acts, as well as * * * [his] * * * failure to give a satisfactory explanation of the derogatory information adduced by the investigation," the Commission was unable "to make a finding that * * * [plaintiff is] * * * suitable" for Federal employment", and, hence, was rating "ineligible" the applications he had filed for Federal employment?

David Carliner
Attorney for Plaintiff

Gil Zimmerman
Assistant United States Attorney
Attorney for Defendants

ORDER

This cause having come before the Court on plaintiff's "Motion to Enforce Judgment on Mandate" and defendants' Opposition thereto, and on the parties' cross-motions for summary judgment on plaintiff's "Second Cause of Action" pursuant to stipulation orally made and reduced to writing in this case; counsel having been heard; the Court having considered the administrative records certified by the Civil Service Commission, being fully advised in the premises, and having entered an Oral Opinion on January 6, 1967,

It is by the Court this 16th day of January, 1967, ORDERED, ADJUDGED and DECREED:

1. That plaintiff's "Motion to Enforce Judgment on Mandate" be, and the same hereby is, denied;

2. That plaintiff's motion for summary judgment on his "Second Cause of Action" be, and the same hereby is, denied.

3. That defendants' motion for summary judgment on plaintiff's "Second Cause of Action" be, and the same hereby is, granted, and this action is hereby dismissed.

/s/ George L. Hart
United States District Judge

NOTICE OF APPEAL

Notice is hereby given this 13th day of February, 1967, that the plaintiff Bruce C. Scott hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 16th day of January, 1967 in favor of the defendants against said plaintiff.

/s/ David Carliner,
Attorney for Bruce C.
Scott, Plaintiff

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,841

BRUCE C. SCOTT,
Appellant,

v.

JOHN W. MACY, JR., et al.
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTIONS PRESENTED

1. Whether specifications relating to arrests, the circumstances of which involve no allegation of immoral or homosexual conduct, and specifications setting forth alleged admissions of being a "homosexual", "perverted", and having a "lover", and setting forth an undenied accusation of being "homosexual" and engaging in "homosexual conduct", comply with the mandate of this Court in *Scott v. Macy*, 121 U.S. App. D.C. 205, 349 F.2d 182 (1965).

2. Whether a decision rating an applicant for federal employment under disqualification for "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct" (5 C.F.R. 731.201(b))may be sustained in the absence of evidence of such conduct.

3. Whether the bar to an applicant based upon a claim that he has engaged in homosexual acts may be sustained against a Civil Service Commission Statement of Policy, implementing 5 U.S.C. 631, which requires a determination based upon various considerations, none of which are relied upon here.

4. Whether an applicant may be barred from federal employment for past conduct, so distant in time as not to be related to present fitness.

5. Whether an applicant may be barred from federal employment upon the sole allegation that he has engaged in homosexual conduct without a showing of its effect upon his fitness for such employment.

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CITATIONS

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BRUCE C. SCOTT,
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JOHN W. MACY, JR., et al.
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order denying a motion by the appellant to enforce judgment on mandate, granting appellees' motion for summary judgment, denying appellant's cross motion for summary judgment, and dismissing appellant's complaint. The Order was entered by the District Court on January 16, 1967. Jurisdiction of the District Court was invoked under the Declaratory Judgment Act (28 U.S.C. 2201) and under the Administrative Procedure Act (5 U.S.C. 1009). This Court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This case is before this Court for the second time. See *Scott v. Macy*, No. 18,483, United States Court of Appeals for the District of Columbia Circuit, 121 U.S. App. D.C. 205, 349 F.2d 182 (1965). (JA 22).

The appellant, an otherwise qualified applicant for appointment to the competitive federal service (JA 3, 4) had been ruled ineligible for federal employment for a period of three years from May 16, 1962 by the Civil Service Commission "because of immoral conduct", which was specified, without more, to be "homosexual conduct". Upon judicial review of the Commission's order, this Court held that the Civil Service Commission "may not rely on a determination of 'immoral conduct' based only on such vague labels as 'homosexual' and 'homosexual conduct' as a ground for disqualifying appellant from Government employment." 349 F.2d 182, 185 (JA 28).

The District Court below thereafter on September 15, 1965 entered a judgment on the mandate of this Court entering summary judgment for the appellant "without prejudice to the Civil Service Commission making a new determination, if it so desires, of plaintiff's suitability for Federal employment, in a manner not inconsistent with the Court of Appeals' decision" (JA 40).

On December 3, 1965, the Civil Service Commission submitted to the appellant a statement setting forth "Information Disclosed By Investigation in the Case of Bruce Chardon Scott" in which it requested an explanation of "various matters." (JA 42-46)

Four "matters" were set forth. One relates to an arrest for loitering in 1947, the facts of which are substantially set forth in footnote 1 of this Court's opinion at 349 F.2d 183 (JA 23). The second involves an arrest in 1951 upon no charge for alleged conduct by the appellant in "standing over, sitting with," and "run(ing) his hands" over the pockets of a drunken soldier. The third matter comprises state-

ments alleged to have been made to a former supervisor that the appellant admitted that "he was a homosexual", that "he was perverted since he was a young boy," that "he lived in Alexandria, Virginia with an employee of the Government who he considered as his lover", together with various other statements and opinions by the supervisor. The fourth matter is an allegation that appellant's next door neighbor accused appellant in his presence and in the presence of others "of being a homosexual and of having committed homosexual acts" and that the appellant "neither admitted nor denied the accusation and made no answer or explanation". (JA 43-46)

Upon the basis of the four matters set forth above, the Civil Service Commission asked the appellant: "In view of the information which has been cited above, do you now deny that you have engaged in homosexual acts?" (JA 46).

In response to the Commission's questions, appellant provided a full and detailed explanation regarding each "matter". He set forth the circumstances of the arrest for loitering in 1947, and of a disagreement between the appellant and a Civil Service Commission Investigator, fifteen years later, as to a description of the circumstances of the arrest (JA 54-57). He explained that his arrest in 1951 arose from the appellant's attempt to arouse a soldier who had "passed out in a side doorway of the Greyhound Bus Station". (JA 57-59) Appellant denied the allegations of his former supervisor that he had ever stated that he was "perverted" since the appellant's "standard has always been to seek and become whatever God or Nature created (him) to be. . . and not to pervert (himself) into something (which he is) not". (JA 66). Appellant denied also his former supervisor's statement that he had characterized an apartment-mate as a "lover". "The word has no precise meaning to me", appellant stated, and "has connotations to other people which are incorrect". (JA 66). As to his failure to respond to the accusation of his neighbor that he was a homosexual, appellant stated: "If I consider the matter

(his private sexual behavior) of no concern to the Civil Service Commission, I consider it to be even less the concern of anyone else". (JA 67).

In response to the question whether the appellant denies that he has engaged in homosexual acts, the appellant stated: "The Civil Service Commission has not been granted authority . . . to investigate the sex-lives of civil service applicants, and any such grant would be contrary to the right of privacy inherent in the Bill of Rights". He declined to answer the question upon the ground that the Civil Service Commission is authorized to "ascertain the fitness" of candidates for government service only for a purpose to 'promote the efficiency' of the civil service". (JA 48, 51).

The Chief of the Division of Adjudication of the Bureau of Personnel Investigations of the Civil Service Commission on March 11, 1966 again rated the appellant ineligible for federal employment. (JA 69-71) As the basis for the ruling, the letter stated:

> "Consideration has . . . been given to (appellant's) refusal to comment or to furnish information as to whether or not (appellant has) engaged in homosexual acts, and to (his) failure to deny the admissions made by (appellant to his former supervisor in 1960). . .(and his) failure to give a satisfactory explanation of the derogatory evidence adduced by the investigation". (JA 71).

Appellant made a timely appeal of the adverse decision on March 23, 1966. Thereafter, he set forth as grounds for the appeal that (1) none of the specifications of conduct set forth in the Information of December 3, 1966 involves any allegation of "immoral conduct", (2) that the demand for a response to a question whether the appellant had engaged in "homosexual acts" is in conflict with the mandate of this Court's prior decision; (3) that the finding that appellant had failed to give "a satisfactory explanation of the evidence adduced by the investigation" is capricious and arbitrary; (4) That the finding is in conflict with the stated

policy of the Civil Service Commission to determine the eligibility of accused homosexuals for federal employment by considering the "types of deviate sexual behavior engaged in, whether isolated, intermittent, or continuing acts, the age of the particular participants, the extent of the promiscuity, the aggressive or passive character of the individual's participation, the presence of physical, mental, emotional, or nervous causes . . . (and) the public or private character of the acts"; and (4) That the prior decision of the Civil Service Commission relied upon the identical allegations as a basis for barring the appellant from competitive federal employment for a period of three years from May 16, 1962, and that absent any charges of offending conduct in the intervening period, the Commission may not reinvoke the earlier conduct to impose a new bar to employment. (JA 73-77)

The Director of the Bureau of Personnel Investigiations on May 5, 1966, affirmed the decision of the Division of Adjudication. (JA 77-78) On further administrative appeal, the Board of Appeals and Review affirmed the decision on June 22, 1966, and the Civil Service Commission, upon a final administrative review, on September 13, 1966, declined to reverse or modify the decision. (JA 79-81).

Appellant thereafter filed a Motion To Enforce Judgment on Mandate in the Court below and for an order by the District Court to "direct that the defendants may not rate the plaintiff ineligible for federal employment upon the ground that he is disqualified for immoral conduct" (JA 40). The Appellee responded with an opposition to the appellant's motion to enforce the Mandate of the District Court and moved, in addition, to "affirm current Civil Service Commission Decision". (JA 41).

At the hearing upon the cross motions, an oral stipulation was agreed to by the parties and approved by the District Court, subsequently reduced to writing (JA 89-91) under which the appellant "orally amended his complaint to add a second cause of action for a judgment declaring that the Civil Service Commission's proceedings and second decision relating to

the appellant are invalid and not in accord with law", and permitting both parties to move for summary judgment upon the second cause of action upon the following issues:

(1) Whether it was arbitrary or capricious for the Civil Service Commission to require the appellant to respond to five specified questions upon the basis of a statement "Information Disclosed by Investigation".

(2) Whether as to the appellant, the Commission is correct as "a matter of law" that "homosexual conduct. . . without evidence of rehabilitation" renders a person unsuitable for federal employment by reason of criminal or immoral conduct.

(3) Whether it was arbitrary or capricious for the Commission to conclude, upon the basis of the evidence and findings in the administrative record, that the appellant is "ineligible for federal employment."

The District Court, upon the basis of the entire administrative and judicial record in the Court below, including the record prior to this Court's decision in the first appeal, denied the appellant's motions to enforce the judgment on the mandate and for summary judgment, and instead, granted summary judgment for the appellees (JA 87-89, 92). This appeal followed. (JA 92).

STATEMENT OF POINTS

1. The Civil Service Commission failed to comply with the mandate of the District Court entered below in accordance with the opinion of this Court in *Scott v. Macy*, No. 18,483, 121 U.S. App. D.C. 205, 349 F.2d 182, requiring the appellees to "specify the conduct (of the appellant) which it finds 'immoral'."

2. No finding or specification of immoral conduct by the appellant is established by the administrative record.

3. A determination of the morality of the appellant's conduct is unrelated to the appellees' statutory authority to prescribe qualifications for federal employment.

4. The disqualification of the appellant for federal employment upon the ground of alleged immoral conduct unrelated to the time of such conduct is a denial of due process and violates the Fifth Amendment.

5. Reliance upon conduct alleged to have occurred in 1947 and in 1951 to determine fitness for employment in 1966 is in conflict with 5 U.S.C. 631 which requires a determination of present fitness.

6. The determination that persons who have engaged in homosexual conduct are not suitable for federal employment is unrelated to the statutory authority of the appellees to prescribe qualifications for such employment is arbitrary, capricious, discriminatory, and denies the appellant due process.

7. The finding that homosexual conduct is "immoral in nature" is arbitrary and capricious.

STATUTE AND REGULATION INVOLVED

5 United States Code 631, R.S. 1753, 16 Stat. 514, provides:

> "The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties and establish regulations for the conduct of persons who may receive appointments in the civil service."

5 Code of Federal Regulations 731.201 provides:

> "Grounds for disqualification. An applicant may be denied examination and an eligible may be denied appointment for any of the following reasons:
>
> * * *

"Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;"

SUMMARY OF ARGUMENT

1. The mandate of this Court, when this case was first here, required the Civil Service Commission to specify the conduct which it found to be "immoral" before it could disqualify him from federal employment under its regulation prohibiting employment to applicants who have engaged in "immoral conduct".

None of the conduct charged to the appellant by the Commission in the subsequent proceedings evidences any "immoral" or "criminal" acts, and was so conceded by the Court below. Absent a specification of acts which are in fact "immoral", the Commission's decision violates the mandate of this Court.

2. While its decision to rate the appellant as "ineligible" for federal employment is based upon 5 C.F.R. 731.201(b), which bars applicants for "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct", the Commission's findings on their face contain no evidence of such conduct. Without an evidentiary basis for its decision, the Commission's ruling is invalid.

3. The statute governing the Civil Service Commission requires that its inquiry regarding the qualifications of applicants be related to the efficiency of the federal service. And the Commission itself in defining the homosexual acts which are to be a bar to federal employment has enumerated extensive "pertinent considerations" to determine both the nature of the act and the "total impact of the applicant upon the job". But it failed to apply those considerations in determining the appellant's application and thus went beyond its statutory authority in barring him from federal employment.

4. Such evidence as was relied upon by the Commission was remote in time from the date of the appellant's appli-

cation for federal employment. The four allegations related to events and conversations which took place 19, 15, 6, and 4 years prior to the application for employment. Reliance upon such stale allegations, even were they evidence of immoral conduct, violates both the statute which requires a determination of present fitness and of due process which requires fairness.

5. Assuming that the appellant has engaged in homosexual conduct, there being no evidence that he has caused revulsion among fellow employees, made advances, solicitations or assaults for homosexual acts, or used his position to foster homosexual activity, the Commission has failed to establish that it is necessary to bar him from federal employment for the efficiency of the service. The claim that such conduct is "criminal" and "immoral", without relationship to the efficiency of the civil service, does not suffice because the Commission has not been established to enforce the criminal laws or to uphold the mores of society.

ARGUMENT

I

The Civil Service Commission Failed to Comply With the Mandate of This Court Which Requires It To "Specify the Conduct Which It Finds 'Immoral'."

The Civil Service Commission was under a mandate which followed this Court's opinion, when this case was first here, that it could not bar the appellant from federal employment for "immoral conduct" without specifying the conduct which it found to be "immoral", and that it must avoid "such vague labels as 'homosexual' and 'homosexual conduct'." 349 F.2d 182, 185. (JA 28).

The Commission manifestly failed to comply with this mandate. Neither the circumstances of the arrest for loitering in 1947 or of the arrest upon no charge in 1951 indicate any "immoral" conduct, or, indeed, any conduct

which may be considered "derogatory". Nor do the allegations of a former supervisor that the appellant admitted that he was a "homosexual", was "perverted", and lived with an employee considered to be a "lover", or the accusation of a next door neighbor that the appellant is "homosexual" and "has committed homosexual acts" serve as any more specific than the original charges by the Civil Service Commission, in virtually identical language, which this Court has already rejected.

The mandate of this Court in the first *Scott* decision, as well as the decisions in *Pelicone v. Hodges*, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963), *Money v. Anderson*, 93 U.S. App. D.C. 130, 208 F.2d 34 (1953), *Deak v. Pace*, 88 U.S. App. D.C. 50, 185 F.2d 997 (1950) require reversal of the decision below and an order to the Civil Service Commission directing it both to vacate its decision to bar the appellant from federal employment, and to determine that the appellant is, in fact, suitable for federal employment. *Cf.*, *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 621 (1966).

II

No Finding or Specification of Immoral Conduct by the Appellant Is Established by the Administrative Record

As authority for its action in determining that the appellant is ineligible for federal employment, the Civil Service Commission expressly relied upon Part 731 of its regulations, 5 C.F.R. 731.201 (b), which states as reasons for disqualification:

> "Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct".

As the sole basis for the appellant's disqualification, under this regulation, the Chief of the Division of Adjudication, whose decision was sustained through all the administrative appeals, declared:

"The results of investigation in your case have been carefully considered, as have your statements in the interview of April 27, 1962, and your letter of December 20, 1965. Consideration has also been given to your refusal to comment or to furnish information as to whether you have engaged in homosexual acts, and to your failure to deny the admissions made by you, as reported by Mr. Keyes, during the course of his conversation with you in 1960. These matters are pertinent to a determination of your fitness. Accordingly, in the light of the investigation and your failure to respond to the question whether or not you have engaged in homosexual acts, as well as your failure to give a satisfactory explanation of the derogatory evidence adduced by the investigation, I am unable to conclude that you meet the standards of fitness for employment in the competitive federal service. Therefore, the applications under consideration are rated ineligible." (JA 71).

It is clear that nothing in the reasons set forth above, or in the materials which are cited, establishes the conduct barred by the regulation. If the appellant is to be determined to be not fit for federal employment because of "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct", which is the effect of the Commission's decision here, it is long since settled that there must be an evidentiary basis for the administrative finding. *Bond v. Vance*, 117 U.S. App. D.C. 203, 327 F.2d 901, 902 (1964); *Pelicone v. Hodges*, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963); *Mulligan v. Andrews*, 93 U. S. App. D.C. 375, 211 F.2d 28, 30 (1954); *Money v. Anderson*, 93 U.S. App. D.C. 130, 208 F.2d 32 (1953); *Estep v. United States*, 327 U.S. 114, 122-123 (1945); *Wittmer v. United States*, 348 U.S. 375, 381 (1954). See also Note, Dismissal of Federal Employees – The Emerging Judicial Standard, 66 Col. L. Rev. 719, 722-725 (1966).

III

The Commission Exceeded Its Statutory Authority in Disqualifying Appellant on the Basis of Alleged Immoral Conduct Because It Had Failed To Show How a Disqualification for Appellant's Alleged Conduct Is Relevant To Promoting the Efficiency of the Government Service

The relevant statute authorizes "such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency there. . ." 5 U.S.C. § 631. The regulation which provides that "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct" is grounds for disqualification for federal employment, 5 C.F.R. 731.201 must necessarily be related to this statutory purpose. See *United Public Workers of America v. Mitchell,* 330 U.S. 75, 101, (1947), in which the Supreme Court sustained the Hatch Act upon the basis that political activities by government employees are "reasonably deemed by Congress to interfere with the efficiency of the public service". And see *Shelton v. Tucker,* 364 U.S. 479, 488 (1960), in which inquiry by the state into membership affiliations of public school teachers was disallowed absent a showing of the need for this information in determining fitness to teach.

That the reach of the Civil Service Commission's ban against the appellant goes beyond its statutory power is indicated by the fact that the Commission has itself declared as a stated policy that "evidence showing that a person has homosexual tendencies, standing alone, is insufficient to support a rating of unsuitability on the ground of immoral conduct" and, further, that "homosexual or sexually perverted acts" will not necessarily render an applicant unsuitable for federal employment. (JA 82-83)

In determining whether a person has engaged in "homosexual" acts, which are a bar, the Commission states:

". . . We consider the term 'homosexual' to be properly used as an adjective to describe the nature of overt sexual relations or conduct. Consistent with this usage pertinent considerations encompass the type of deviate sexual behavior engaged in, whether isolated or intermittent, or continuing acts, the age of the particular participants, the extent of the promiscuity, the aggressive or passive character of the individual's participation, the recency of the incidents, the presence of physical, mental, emotional, or nervous causes, the influence of drugs, alcohol, or other contributing factors, the public or private character of the acts, the incidence of arrests, convictions, or of public offense, nuisance, or breach of the peace related to the acts, the notoriety, if any, of the participants, the extent or effect of rehabilitative efforts, if any, and the admitted acceptance of or preference for homosexual relations. Suitability determinations also comprehend the total impact of the applicant upon the job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society."

Implicit in this cataloguing of considerations is that there must be "homosexual acts," as defined and that the applicant who has engaged in such acts must have an "impact upon the job".

Compare the list of considerations which the Civil Service Commission has said are pertinent with the evidentiary basis of the Commission's rating of ineligibility imposed against the appellant. There are no charges to indicate and there is no record to establish (1) the type of sexual deviate behavior, whether isolated, intermittent, or continuing; (2) the ages of participants, if any; (3) whether the behavior, if any, is promiscuous; (4) whether it was aggressive or passive; (5) the recency of the incidents, if any; (6) the presence of any physical, mental, emotional, or nervous causes; (7) the influence of drugs, alcohol, or other contributing factors; (8) whether the acts, if any, have been public or private; (9) any arrests or convictions for such acts; (10) the notoriety of any participants; or (11) any rehabilitative efforts.

The sole "evidence" out of all of these many "pertinent considerations" is the claim of another person that the appellant has said he is a "homosexual" and the appellant's statement that he believes "in the dignity and worth of all men, regardless of race, color, national origin, gender, sexual orientation, preference, or nature, or any other diversity, because (he believes) that the purpose of each human being is to seek and become the person God or Nature created him to be. . ." (JA 66).

The determination of the appellant's possible "total impact upon the job" lacks even this shred. There is no showing whatever of any likelihood of "disruption of service efficiency" by any "revulsion of other employees" toward the appellant; (2) of the likelihood of any "homosexual advances, solicitations or assaults" by the appellant; (3) that the appellant is a person who would be "unavoidably [sic] subjected . . . to erotic stimulation through the on-the-job use of a common toilet, shower, or living facilities; (4) that there would be any offense to members of the public, if any, who would transact business with the appellant; (5) that the appellant would use the "authority and prestige of a Government position to foster homosexual activity".

The Civil Service Commission was not without the ability to set forth such evidence, if indeed there were any, for the record establishes that the appellant has had 17 years continuous employment by the federal government in the Department of Labor in positions of increasing responsibility (JA 3), and has access to all of his personnel records. Such evidence as there was contradicts any suggestion of unfitness. According to the Commission's Statement of Information relating to the Appellant, Appellant's record of service resulted in a "very glowing testimonial from the appellant's former (Labor Department) supervisor" (JA 45).

In the face of the requirement of the statute that the Civil Service Commission's regulations be for the purpose of "promoting the efficiency" of the civil service and in the absence of any showing whatever that the conduct inputed to the appellant has any impact upon his fitness "for the branch of service he seeks to enter", the ruling that the appellant is not suitable for federal employment should be set aside.

IV

The Disqualification of Appellant for Federal Employment Upon the Ground of Immoral Conduct Without Regard to the Time of the Alleged Conduct Is Not Within the Commission's Statutory Authority, Is in Conflict With the Commission's Statement of Policy, and Arbitrarily Denies Appellant Due Process

The Commission's statutory authority to "ascertain the fitness" of candidates for federal employment "in respect to age, health, character, knowledge, and ability" on its face requires a determination based upon each of those factors at the time the candidate "seeks to enter" the service of the government. 5 U.S.C. 631. No distinction is made in the statutory language which would justify a determination of eligibility based upon present age, health, knowledge, and ability, but upon past character.

Yet this is precisely how the Civil Service Commission has made its determination of the appellant's eligibility. His qualifications as to age,[1] health,[2] knowledge and ability, [3] are each based upon each of those factors at the time of the appellant's application. But in its decision to disqualify the appellant upon the basis of his "character and fitness" (JA), the Commission has relied upon circumstances surrounding an arrest for loitering 19 years earlier in 1947, an arrest upon no charge 15 years earlier in 1951, alleged admissions six years earlier in 1960 relating to behavior during an earlier, unspecified time, and the failure to deny an accusation four years earlier in 1962. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957) and *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1951) forbid reliance upon conduct in the remote past as a basis for determining present fitness. Similarly, *International Union of Mine, Mill, and Smelter Workers v. Subversive Activities Control Board*, 121 U.S. App. D.C. 310, 353 F.2d 848 (1965), following *American Committee for the Protection of Foreign Born v. Subversive Activities Control Board*, 380 U.S. 503 (1965), and *Veterans of the Abraham Lincoln Brigade v. Subversive Activities Control Board*, 380 U.S. 513 (1965), bar an administrative adjudication upon evidence so stale.

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[1]Appellant's application for federal employment, Form 57, in the Administrative Record Government Exhibit A-1, indicates that he was born March 7, 1912, and the record is absent any suggestion that being 53 years old at the time of his application in 1965, appellant is ineligible for federal employment.

[2]The questions and answers on the Form 57 relating to health fail to indicate a bar to eligibility based on health.

Appellant has been rated eligible for various positions based upon examinations and ratings as of October 6, 1965. See Availability Inquiries, Government's Exhibit A-1.

This much is implied by the Civil Service Commission's statement of policy of February 25, 1966, in which it set forth "recency of the incidents" as one "pertinent consideration" in determining the suitability of persons alleged to have engaged in homosexual conduct. Assuming that the conduct with which the appellant has been charged are in fact "incidents" involving homosexual acts, it can scarcely be argued that "incidents," 19 years, 15 years, 6 years, and 4 years past are "recent," especially in view of the Commission's own use of the period of three years as the basis for determining the length of the time of disqualification for impermissible conduct. (JA 15).

V

The Civil Service Commission May Not Bar an Applicant Who Engages in Homosexual Conduct, Absent a Showing That Such Conduct Is Related to His Suitability for Federal Employment

The underlying basis of the Commission's decision to bar the appellant from federal employment derives from its statement of policy of February 25, 1966, that "persons about whom there is evidence that they have engaged . . . in homosexual or sexually perverted acts . . . without evidence of rehabilitation, are not suitable for Federal employment". (JA 82).

As applied to the appellant, assuming that the record is read most favorably to support the finding of the Commission, the most that can be said is that he falls within the proscription of the Commission's statement of policy which holds:

> "To be sure if an individual applicant were to publicly proclaim that he engages in homosexual conduct, that he prefers such relationships, that he is not sick, or emotionally disturbed, and that he simply has different sexual preferences . . . the Commission would be required to find such an individual unsuitable for Fed-

> eral employment. . . The self-revelation by announcement of such private sexual behavior and preferences is itself public conduct which the Commission must consider in assaying an individual's suitability for Fedderal employment". (JA 85, 86).

Apart from the question whether such a statement in itself may be held to be "immoral conduct" for the purpose of disqualifying an applicant for federal employment, a proposition appellant has disputed above at pp. 10-11, the issue is posed whether evidence merely that a person has engaged in homosexual or sexually perverted acts renders him unfit for employment.[4]

Nothing in Civil Service Commission's detailed explanation of its policy against the employment of persons who have engaged in homosexual acts bears upon the need for its bar "to promote the efficiency" of the federal competitive service. Its defense of the bar turns rather upon the ground that "homosexual conduct. . . is a crime in every jurisdiction, except under specified conditions, in Illinois.[5] Such conduct is also considered immoral under the prevailing mores of our society".

It suffices to say that the Civil Service Commission does not sit to enforce the criminal laws against homosexual conduct or to safeguard the prevailing mores of society. Its concern is limited to those matters which promote the efficiency of the civil service. *United Public Workers v. Mitchell,*335 U.S. 75 (1947), op. cit.

Despite the availability to the Commission of a mass of data on personnel behavior, the efficiency of government

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[4] This is to be distinguished from those cases in which the Commission has relied upon evidence showing that an applicant has engaged in conduct which has resulted in revulsion by fellow employees, made "homosexual advances, solicitation or assaults, or used his position to foster homosexual activity. (See JA 82-83).

[5] At the time of his last application for employment, appellant was a resident of Illinois. See Form 57, Government's Exhibit A-1.

employees, and its knowledge of the sexual behavior of employees and of applicants whom it has investigated, no material has been cited to show that the employment of a person who engages in homosexual conduct would necessarily interfere with the efficiency of the federal service.[6]

To the contrary are at least three authorities. The Committee on Cooperation With Government (Federal) Agencies for the Group for the Advancement of Society, its Report on Homosexuality with Particular Emphasis on This Problem in Governmental Agencies, Report No. 30, January, 1955, p. 5 concluded:

> "In the governmental setting as well as in civilian life, homosexuals have functioned with distinction, and without disruption of morale and efficiency. Problems of social maladaptive behavior, such as homosexuality, therefore need to be examined on an individual basis, considering the place and circumstances rather than from inflexible rules".

See also Kinsey, et al., *Sexual Behavior in the Human Male, pp.* 201, 202:

> "Many of the socially and intellectually most significant persons in history, successful scientists, educators, physicians, clergymen, businessmen, and persons of high positions in governmental affairs have socially taboo items in their sexual histories. . . ."

See also *Boutilier v. Immigration and Naturalization Service,* No. 440, October Term, 1966, United States Supreme Court, decided May 22, 1967, dissenting opinion, Douglas, J: "It is common knowledge that in this century homosexuals have risen high in our own public service–both in Congress and in the Executive Branch–and have served with distinction," U.S. , (1966).

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[6]No question exists here of a "security risk" or of "infamous or scandalous conduct which brings disrepute to the Federal Service", or of "psychiatric or medical disqualification". Cf.,Report on the Employment of Homosexuals and Other Sex Perverts in Government, S. Doc. No. 241, 81st Cong., 2d Sess. (1950).

Absent a showing that homosexual conduct in fact interferes with governmental efficiency, the Commission's statement of policy lacks a "connection between the fact proved and (the fact) presumed. . ." *Manley v. Georgia*, 279 U.S. 1, 7.

If conclusive presumptions are not to be regarded as due process for other acts by government, they may not be invoked as a bar to employment by the government. *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961).

CONCLUSION

For the reasons advanced above, the decision below should be reversed and the Court below should be directed to enter an order to require the Civil Service Commission to determine that the appellant is eligible for federal employment.

Respectfully submitted,

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BRIEF FOR APPELLEES

IN THE UNITED STATES COURT OF APPEALS FOR
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No. 20,841

BRUCE C. SCOTT,

Appellant,

v.

JOHN W. MACY, JR., ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF QUESTION PRESENTED

In the opinion of appellees, the question is: Whether in light of the applicable statutory provisions, executive orders, and regulations, an applicant for employment in the civil service may be disqualified for refusal to answer the Civil Service Commission's inquiries concerning homosexual conduct made in the course of an investigation to determine the applicant's fitness of character, where the Commission has specified to the applicant information it has received which tends to indicate that the applicant may have engaged in homosexual acts.

I N D E X

CITATIONS

Cases:

Cases: Page

Statutes, Rules and Regulations:

Miscellaneous:

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* Cases or authorities chiefly relied upon are marked by asterisks.

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COUNTERSTATEMENT OF THE CASE

The appellant is an applicant for appointment to the positions of personnel officer and management analyst in the competitive federal civil service (J.A. 69). In February, 1962, he was notified that he had qualified for certain positions, subject to a suitability investigation (J.A. 3-4, 22-23). During the course of a personal interview, the appellant offered an explanation of his arrest in 1947 for loitering near a public men's room and of his arrest in 1951 for investigation after an incident involving a drunken soldier in a doorway (J.A. 23); however,

when in the course of the interview he was told that the Civil Service Commission had information indicating that he was a homosexual and was asked if he wished to comment, he refused, stating "I do not believe the question is pertinent insofar as my job performance is concerned" (J.A. 4). On May 16, 1962, appellant was disqualified for employment in the competitive service for a period of three years because of immoral conduct, under the regulation authorizing that as a ground for disqualification (J.A. 18, 23).

Thereafter, the appellant filed a complaint in the court below seeking a judgment declaring that his applications for federal employment "may not be rated ineligible upon the ground that he is disqualified for immoral conduct or because he has engaged in homosexual conduct" (J.A. 7). The district court granted the Government's motion for summary judgment and dismissed the action (J.A. 20). Upon the appellant's appeal, this Court reversed, entering separate opinions (one by Chief Judge Bazelon, one by Judge McGowan, and a dissenting opinion by Judge Burger). Scott v. Macy, 121 U.S. App. D.C. 205, 349 F. 2d 182 (June 16, 1965) (J.A. 22). Chief Judge Bazelon stated in his opinion that "The Commission must at least specify the conduct it finds 'immoral' and state why that conduct related to 'occupational competence or fitness' * * * " (J.A. 27). Chief Judge Bazelon concluded by pointing out that the reversal "does not preclude the Commission from excluding appellant from eligibility

for employment for some ground other than the vague finding of 'immoral conduct' here." (J.A. 28). Judge McGowan concurred "solely for what seem to me to be the inadequacies, in terms of procedural fairness, of the notice given to appellant of the specific elements constituting the 'immoral conduct' relied upon as disqualifying him for all federal employment" (J.A. 28). Judge McGowan also pointed out that "the Commission is, of course, free to initiate such further action as it chooses to exclude him from eligibility even for consideration, subject as always to appropriate procedural standards"(J.A. 29). Judge Burger dissented, believing that appellant had waived, through his challenge to the right of the government to inquire into his sexual habits, his contentions that he was entitled to a specification of the immoral conduct (J.A. 31-33).[1/] Judge Burger went on to state that even if these contentions were not waived, neither the Constitution nor the statute and regulations gave the appellant, as an applicant for employment, any more procedural rights than he received; further, Judge Burger believed that the question of the arbitrariness of the ground for disqualification was not open (J.A. 33-38).

On September 15, 1965, the District Court entered judgment on the mandate (J.A. 40). Thereafter, on December 3, 1965,

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1/ With respect to the matter of waiver, Judge McGowan pointed out that "appellant came perilously close to abandoning this claim to lack of adequate notice, but I do not read the record as showing that this brink was ever finally crossed" (J.A. 29). In this connection, see the transcript of proceedings in the district court on January 6, 1967, pp. 5-8 (Tr. 5-8).

the Commission, in the course of its investigation of the appellant, submitted to him a statement of the information its investigation had disclosed (J.A. 42). Four matters were set forth: the two arrests which had been discussed in the previous investigation (J.A. 42-44); the statement of appellant's former supervisor in which the supervisor alleged that appellant had stated that he was a homosexual, that he had been perverted since he was a young boy, and that he lived with an employee of the Government who was his lover (J.A. 44-45); and the substance of a police record reflecting that after an incident at appellant's home necessitated that the police be called, the appellant made no response to a neighbor's accusation that appellant was a homosexual and had committed homosexual acts (J.A. 45-46). The Commission then asked the appellant to comment on or explain all the matters and to answer four questions which asked if he denied any part of the reported facts and circumstances concerning the four matters (J.A. 46). A fifth question was asked:

> In view of the information which has been cited above, do you now deny that you have engaged in homosexual acts? (J.A. 46).

The appellant replied on December 20, 1965 (J.A. 47-68). He denied in part and affirmed in part the reported circumstances and statements concerning the four matters (J.A. 48), and gave explanations with respect to the arrests and the incident at his home (J.A. 55-68). However, as to the statement of his former supervisor, he stated that the supervisor's

characterization of my * * * apartment-mate as my "lover" is his own fantasy. The word has no precise meaning to me, and has connotations to other people which are incorrect. * * *

The assertion of [the supervisor] that I told him that I was perverted since a young boy is a misuse of the word "pervert" and is pure nonsense. * * * [M]y standard has always been to seek and become whatever God or Nature created me to be, to be true to my real self * * * -- not to pervert myself into something I am not * * * . Insofar as I have been true to my real self, I cannot be described as "perverted".

The conclusion of [the supervisor], "I would not recommend him for a position of responsibility and trust in the Federal Service because he is a homosexual" is circular and specious reasoning. The question of whether I am or am not a "homosexual", whatever the word means, is irrelevant to how I would conduct "a position of responsibility and trust in the Federal Service" * * * (J.A. 66-67).

Appellant did not deny or even comment upon the allegation that he had told his former supervisor that "he was a homosexual" (J.A. 45). As to the accusation of the neighbor that appellant was a homosexual and had committed homosexual acts, appellant stated that "if I consider the matter to be no concern of the Civil Service Commission, I consider it to be even less the concern of anyone else" (J.A. 67).

With regard to the fifth question, asking if he denied having engaged in homosexual acts, appellant refused to answer, stating that he

> respectfully must decline to answer for * * * the Civil Service Commission has not been granted authority by law or by its regulations to investigate the sex-lives of civil service applicants * * * (J.A. 48).

By letter of March 11, 1966, the Civil Service Commission's Bureau of Personnel Investigations informed appellant that his applications for federal employment were rated ineligible (J.A. 69-71). The Bureau's letter pointed out to appellant that the Civil Service Act in 5 U.S.C. (1964 ed.) 631, and the executive orders and regulations promulgated thereunder, require the Civil Service Commission to ascertain the fitness of candidates, and further require (5 C.F.R. 5.3) an applicant, on the Commission's request, to furnish information in his possession so that the Commission can make a determination of his fitness (J.A. 70-71). Next, the Bureau quoted the regulation (5 C.F.R. 731.201) authorizing disqualification for "criminal, infamous, dishonest, immoral or notoriously disgraceful conduct" (J.A. 71). Then, after pointing out that the results of the investigation and appellant's statements had been carefully considered, the Bureau's letter concluded (J.A. 71):

> Consideration has also been given to your refusal to comment or to furnish information as to whether or not you have engaged in homosexual acts, and to your failure to deny the admissions made by you, as reported by Mr. Keyes, during the course of his conversation with you in 1960. These matters are pertinent to a determination of your fitness. Accordingly, in light of the investigation and your failure to respond to the question as to whether or not you have ever engaged in homosexual acts, as well as your failure to give a satisfactory explanation of the derogatory evidence adduced by the investigation, I am unable to conclude that you meet the standards of fitness for employment in the competitive federal service. Therefore, the applications under consideration for employment are rated ineligible.

Thus, the ineligibility rating was not based upon findings that appellant was in fact a homosexual, or had engaged in immoral conduct, or was unfit for federal employment. Instead, it rested upon the Bureau's inability, due to appellant's refusal to answer questions and give satisfactory explanations, to determine whether appellant was fit for employment.

On May 5, 1966, the Director of the Bureau of Personnel Investigations affirmed the decision of the Bureau, pointing out that the information furnished by appellant and his counsel has not been such "as to enable me to make a finding that you are suitable." (J.A. 77-78). On June 22, 1966, the Board of Appeals and Review concurred in the decision (J.A. 79), and, on September 13, 1966, the Civil Service Commission, upon a final administrative review, declined to reverse or modify the decision (J.A. 80-81).

Appellant thereafter filed in the court below a "Motion to Enforce Judgment on Mandate", requesting that the District Court "direct that the defendants may not rate the plaintiff ineligible for federal employment upon the ground that he is disqualified for immoral conduct" (J.A. 40). The members of

the Civil Service Commission, the appellees herein, opposed appellant's motion on the ground that the Commission has "determined that -- on the record presently before it -- it cannot conclude that plaintiff meets the prescribed suitability and fitness standards for employment * * * " (J.A. 41). The appellees submitted that this determination was in compliance with the mandate of this Court (J.A. 41).

At the January 6, 1967, hearing upon the cross motions, an oral stipulation was agreed to by the parties, approved by the district court, and subsequently reduced to writing (J.A. 89-91), under which the appellant "orally amended his complaint, to add a 'Second Cause of Action', seeking a declaratory judgment that the proceedings conducted, and the decision reached, by the Civil Service Commission [after September 15, 1965] . . . are invalid and not in accord with law", and permitting both parties to move for summary judgment upon the second cause of action (Tr. 2-5; J.A. 89-91).

After hearing argument of counsel (Tr. 2-58), the district court issued an oral opinion (Tr. 58-62; J.A. 87-89) holding that the Civil Service Commission had complied with the mandate of this Court (J.A. 87), that the action of the Commission was not arbitrary and capricious (J.A. 87), that in light of the investigation and information before it, the Commission was justified in asking appellant the questions relating to alleged homosexuality or homosexual acts (J.A. 88), and that the appellant's replies plus his refusal to answer Question No. 5 justified the Commission's "saying they could not find that he was fit" (J.A. 89). Judgment was entered dismissing the action (J.A. 92). This appeal followed (J.A. 92).

STATUTORY PROVISIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

5 U.S.C. (1964 ed.) § 631 provided: 2/

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose

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2/ Under Public Law 89-554, September 6, 1966, codifying the laws relating to the organization of the Government, former § 631 became §3301, with minor changes in language not involving substantive changes in the law.

> he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

The Civil Service Rules, issued by the President November 22, 1954, Executive Order 10577, 19 Fed. Reg. 7521, provide in part, 5 C.F.R. 5.1(a) and 5.3:

> § 5.1(a) The Commission is authorized and directed to promulgate and enforce such regulations as may be necessary to carry out the provisions of the Civil Service Act and Rules * * *.
>
> § 5.3 All officers and employees in the executive branch, and applicants or eligibles for positions therein, shall give to the Commission or its authorized representatives all information and testimony in regard to matters inquired of arising under the laws, rules, and regulations administered by the Commission. * * *

The Civil Service Commission's regulations provide in part, 5 C.F.R. §731.201:

> Reasons for disqualification.
>
> . . . the Commission may deny an applicant examination, deny an eligible appointment, and instruct an agency to remove an appointee for any of the following reasons:
>
> * * *
>
> (b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct;
>
> * * *
>
> (d) Refusal to furnish testimony as required by § 5.3 of this chapter;
>
> * * *

SUMMARY OF ARGUMENT

A. Appellant's arguments on this appeal are: that the Civil Service Commission failed to comply with the mandate of this Court because it did not specify the conduct by appellant found to be "immoral"; that the record fails to establish "immoral conduct"; that the Commission did not show how the alleged "immoral conduct" would have an impact upon the job; that the Commission relied upon events happening many years ago; and that one who engages in homosexual acts is not necessarily unfit for federal employment. All of these arguments are based upon a misconception of the Commission's decision in this case. The Commission did not declare appellant ineligible for federal employment on the ground that he had in fact engaged in "immoral" or "homosexual" conduct. Instead, the Commission was unable to determine whether appellant had engaged in such conduct, the precise nature of such conduct, and whether he was fit for federal employment, all because of the manner in which appellant replied to information submitted by the Commission and particularly his outright refusal to answer certain questions. Declaring appellant ineligible for federal employment on this ground was entirely consistent with this Court's mandate on appellant's prior appeal.

B. Furthermore, the Commission is clearly authorized to declare an applicant ineligible for federal employment under circumstances where the Commission has information raising a doubt about the applicant's fitness, where the Commission asks the applicant to furnish further information and answer questions relating to his fitness, and where the applicant refuses. Such authorization is found in the provisions of the Civil Service Act (5 U.S.C. (1964 ed.) 631), an Executive Order pursuant thereto (5 C.F.R. 5.1 and 5.3), and the Commission's regulations (5 C.F.R. 731.201(d)). See also, Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 720.

C. Finally, the Commission was justified under the facts of this case in asking appellant questions concerning whether he was a homosexual and had engaged in homosexual acts. The information before the Commission, which was submitted to appellant, was at least sufficient to raise a doubt about appellant's fitness for federal employment, and thus the questions posed by the Commission were fully warranted. Since appellant does not deny that one who engages in certain types of homosexual conduct may be properly disqualified for federal employment, the Commission was entitled to ascertain the facts from appellant so that a determination of fitness could be made. Appellant's refusal to furnish the pertinent information, therefore, constituted a clearly sufficient basis for declaring

him ineligible for federal employment.

ARGUMENT

THE CIVIL SERVICE COMMISSION'S DECISION, THAT APPELLANT WAS INELIGIBLE FOR FEDERAL EMPLOYMENT, WAS WARRANTED IN LIGHT OF APPELLANT'S REFUSAL TO ANSWER QUESTIONS POSED BY THE COMMISSION RELATING TO APPELLANT'S FITNESS FOR EMPLOYMENT.

In the opinions by the members of this Court on appellant's prior appeal (J.A. 22-38), and in appellant's brief on the present appeal, the issues discussed relate to the Civil Service Commission's exclusion of an applicant for federal employment on the ground that he had engaged in "immoral conduct" or is a "homosexual". The particular issues dealt with in the earlier opinions of the Court, and by appellant now, involve the need for specification of the "immoral" or "homosexual" conduct and the need to state the relation between the conduct and fitness for employment. In the view of the appellees, as we show in more detail below, these issues are not involved in the present appeal because the Commission did not declare appellant ineligible on the ground that he had engaged in "immoral" or "homosexual" conduct. Instead, the Commission's action was based upon the appellant's refusal to answer pertinent questions relating to his fitness for federal employment. Moreover, as we go on to demonstrate below, the Commission is authorized to disqualify an applicant for federal employment where he refuses to answer proper questions relevant to his fitness for employment. Finally, as we shall show, the Commission in the present

case had an ample basis to ask questions regarding whether appellant was a homosexual and had engaged in homosexual conduct, and such questions are pertinent to a determination of fitness for federal employment.

A. Appellant's Arguments Misconceive the Nature of the Civil Service Commission's Decision in this Case.

In his brief on the present appeal, appellant argues: (1) that the mandate of this Court in Scott v. Macy, 121 U.S. App. D.C. 205, 349 F. 2d 182 (1965) (J.A. 22), required the Civil Service Commission to specify the conduct it deemed immoral; (2) that the record fails to establish immoral conduct; (3) that the Commission exceeded its statutory authority by not considering the factors it has deemed relevant to a determination of whether homosexual acts will have an impact on the job and on the efficiency of the civil service; (4) that acts occurring many years ago have no bearing on a determination of present fitness of character; and (5) that homosexuality per se should not be a bar to civil service employment. However, the appellant's arguments are grounded upon a complete misconception of the decision of the Civil Service Commission rendered after this Court's determination in Scott v. Macy, supra.

There can be no doubt that the Commission complied with the "mandate" of this Court in the earlier appeal. Preliminarily, it should be noted that it may be difficult to determine

precisely what the mandate of this Court was with respect to the situation where the Commission disqualifies an applicant on the ground that he in fact has engaged in "immoral" or "homosexual" conduct, as no two members of this Court's panel were in complete agreement as to what the law requires of the Commission in such a situation. Thus, Chief Judge Bazelon, while recognizing that an applicant for public employment may have less statutory protection than an employee, believed that the Commission could not constitutionally exclude an applicant on the ground that he had engaged in "immoral conduct" without specifying the conduct found to be immoral and stating why that conduct related to his occupational fitness (J.A. 25-27). Judge McGowan, on the other hand, did not base his conclusion on constitutional requirements and did not state that the Commission is required to show the relationship between the "immoral" conduct and fitness for the employment (J.A. 28-31). Further, Judge McGowan assumed for purposes of his opinion that the only limitations upon the Commission's authority to refuse employment were those set forth in statutes and regulations (J.A. 30). Judge McGowan believed, however, that 5 U.S.C. § 631 and the regulations did not authorize the Commission to disqualify an applicant without his having "a fair opportunity to assert his 'fitness', both affirmatively and by way of opportunity to know of, and to defend against, asserted personal shortcomings which are officially charac-

terized as 'immoral conduct' within the meaning of [the] regulations * * *." (J.A. 31). Judge McGowan believed that the "opportunity to know" required notice to be given to appellant "of the specific elements constituting the 'immoral conduct' relied upon as disqualifying him for all federal employment." (J.A. 28). Judge Burger was of the view that even less was required of the Commission under the circumstances then existing, and that the Commission's initial decision should have been upheld (J.A. 31-38).

Even if we assume, for purposes of argument of the instant appeal in this Court, that either Chief Judge Bazelon's position or Judge McGowan's position on the prior appeal are correct, the Commission's decision rendered after that appeal, which is now being challenged, is not inconsistent with those positions. Both Chief Judge Bazelon's views and Judge McGowan's views related to the situation where the Commission found, as a basis for disqualifying an applicant, that the applicant had in fact engaged in immoral or homosexual conduct. Both Chief Judge Bazelon (J.A. 28) and Judge McGowan (J.A. 29) made it clear that the Court's decision did not preclude the Commission from excluding appellant "for some other ground."

The Commission's decision now under attack was unquestionably on "some other ground." The appellant was rejected for federal employment not because the Commission found as a fact that he was unfit or immoral or had engaged in homosexual

acts. The Commission was unable to conclude whether appellant was fit for employment because of appellant's unsatisfactory response to the Commission's questions. Thus, the decision of March 11, 1966 (J.A. 69-71) pointed out that the statute, rules, and regulations

> provide for appropriate investigation by the Commission and require an applicant, on request of the Commission, to furnish information in his possession necessary to enable the Commission to make a determination of his character and fitness (J.A. 70-71)

and went on to quote the regulation concerning the types of conduct that may be disqualifying in order to show that the information sought was necessary to the determination. The decision went on to state that consideration had been given to the Commission's investigation and the applicant's statements and also to his "refusal to comment or to furnish information as to whether or not you have engaged in homosexual acts". The decision then was that

> . . . in light of the investigation and your failure to respond to the question as to whether or not you have ever engaged in homosexual acts, as well as your failure to give a satisfactory explanation of the derogatory evidence adduced by the investigation, I am unable to conclude that you meet the standards of fitness for employment in the competitive federal service. . . .

To reiterate, the Commission did not disqualify the applicant for having engaged in criminal or immoral conduct. Rather, his failure to answer a relevant inquiry rendered the Commission unable to make a determination of fitness and justified his dis-

qualification. Judge Hart stated this as his view of the case during oral argument (Tr. 11-12) and concluded:

> It does seem to me that those instances would justify the Government in asking the question, and require, if the plaintiff wanted to work for the Government, that he answer them.

Obviously, where the Commission does not find that an applicant has engaged in immoral or homosexual conduct, and does not base its decision on such ground, there is no occasion for the Commission to specify conduct deemed to be immoral, or for the record to establish immoral conduct, or for the Commission to show how the particular applicant's conduct relates to the employment. All of appellant's arguments are premised upon the view that the Commission "found" that he had engaged in immoral or homosexual conduct. However, the Commission made no such finding, and appellant's arguments are entirely beside the point.

The only relevant inquiry on this appeal relates to whether the Commission was justified, considering the applicable provisions of the law and the circumstances of this case, in disqualifying the appellant from federal employment in light of his refusal to answer questions posed by the Commission. As we go on to demonstrate, the Commission was justified in taking this action.

B. The Civil Service Commission is Authorized to Declare an Applicant for Federal Employment Ineligible for such Employment where the Applicant Refuses to Furnish Requested Information Relevant to his Fitness for the Positions to which he is Applying.

In the court below, counsel for appellant appeared to argue that the Civil Service Commission was not warranted in requiring that an applicant for federal employment answer questions such as those posed by the Commission which appellant refused to answer; appellant's position seemed to be that the Commission must secure its information from an independent source (Tr. 55-56). However, such an argument is entirely without merit.

Congress provided in the Civil Service Act, 5 U.S.C. (1964 ed.) 631, 2a/ with regard to applicants for employment in the civil service of the United States, that

> The President is authorized to * * * ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries * * *. (Emphasis supplied)

The plain language of the statute makes "fitness" of character and ability relevant factors in the evaluation of candidates for the civil service. Congress has also expressly authorized the conduct of "inquiries" to determine whether an applicant is fit for a position in the civil service, as regards character, ability, and the other criteria.

2a/ Now 5 U.S.C. 3301

By Executive Order 10577 issued November 22, 1954, and published in 19 Fed. Reg. 7521, the President established the Civil Service Rules and delegated his authority under the above-quoted statute to the Civil Service Commission. 5 C.F.R. 5.1(a). In the same order, the President provided that

> all * * * applicants * * * for positions [in the executive branch] shall give to the Commission or its authorized representatives all information and testimony in regard to matters inquired of arising under the laws, rules, and regulations administered by the Commission. (5 C.F.R. 5.3).3/

Thus, an applicant for employment in the executive branch of the Government is expressly required to give the Commission all information inquired of bearing upon his fitness for employment in respect to character and ability. In accordance with this executive order, the Commission by regulation has made the "refusal to furnish testimony as required by § 5.3" a ground for disqualifying an applicant for federal employment, 5 C.F.R. 731.201(d).

Not only do the express provisions of the Civil Service Act, executive order and regulation authorize the Commission to require that applicants for federal employment answer questions and furnish information bearing upon their fitness for such employment, but it is obvious that an employer,

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3/ This provision in the Executive Order is clearly within the statutory authorization to "ascertain" the fitness of an applicant in respect to character and "to conduct such inquiries".

whether public or private, possessed with information raising a question concerning the fitness of an applicant for employment, is entitled to ask questions relevant to the matter and to disqualify the applicant who refuses to answer. Furthermore, the Supreme Court has specifically upheld the right of a governmental employer to inquire of its employees "as to matters that may prove relevant to their fitness and suitability for the public service," Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 720. If anything, it is even clearer that a public employer has such a right with respect to applicants for employment. Furthermore, discharges of employees who have failed to answer such an inquiry have been upheld, Beilan v. Board of Public Education, School District of Philadelphia, 357 U.S. 399; Lerner v. Casey, 357 U.S. 468; Nelson v. County of Los Angeles, 362 U.S. 1. 4/

4/ Whether the situation would be any different where the employee claimed the constitutional privilege against self-incrimination as the basis for the refusal to answer, is not presented in this case because the appellant has not made such a claim. In this connection, however, see Spevack v. Klein, 385 U.S. 511, 519-520 (concurring opinion of Mr. Justice Fortas), indicating that the state may discharge one of its employees who refuses to answer questions relating to his conduct as an employee despite a self-incrimination claim. A mere applicant for employment would seem to be in an even weaker position in this regard.

Consequently, the Civil Service Commission may clearly disqualify an applicant for federal employment under circumstances where the Commission has information raising a doubt concerning the applicant's fitness for employment, where the Commission thus asks the applicant questions pertinent to his fitness for the position, and the applicant refuses to answer the questions. As we go on to show below, these circumstances were present in the instant case.

C. The Information before the Commission was Sufficient to Raise a Doubt Concerning Appellant's Fitness for Employment, and the Questions Asked in light of that Information were Pertinent to the Matter of Appellant's Fitness.

Under the facts of this case, the Commission certainly was justified in asking the appellant questions relating to alleged homosexual conduct. The information before the Commission was sufficient to raise a doubt concerning his fitness for federal employment, and the questions prompted by that information clearly related to appellant's fitness. 5/

The information disclosed by the Commission's investigation of appellant, which information was submitted to appel-

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5/ In light of the principle that judicial review of Executive Branch determinations regarding the hiring and dismissal of employees is limited to determining whether the procedures set forth in applicable statutes and regulations are complied with (Hargett v. Summerfield, 100 U.S. App. D.C. 85, 243 F. 2d 29; Seebach v. Cullen, 338 F. 2d 663 (C.A. 9)), there may be a question in cases such as this as to how far a court should go in reviewing the underlying factual basis for the Civil Service Commission's action. However, in our view, this is a matter which need not be explored in the present case, for under any of the various standards for judicial review of administrative action (i.e., reasonableness, whether in accordance with law, whether supported by substantial evidence, etc.), the Civil Service Commission's action was warranted.

lant, involved four basic occurrences: the 1947 arrest; the 1951 arrest; the Fairfax County discharge and the statements allegedly made by appellant to his then supervisor; and the 1962 incident at appellant's home and the neighbor's accusation that appellant had engaged in homosexual conduct (J.A. 42-46). The statements allegedly made by appellant to his former Fairfax County supervisor, according to the latter, included appellant's admissions that "he was a homosexual," that "he was perverted since he was a young boy," and that he lived with a government employee "who he considered as his lover" (J.A.45). 6/

Regardless of whether the above-described information might be sufficient in itself to support a disqualification on grounds of immorality (which, as previously noted, is not an issue on this appeal), this information was unquestionably of a nature which justified and even required the Commission to inquire further into appellant's fitness for federal employment. Any suggestion that a prospective employer, having in his possession such information about an applicant for employment, would not be justified in asking the applicant whether he was a homosexual or had engaged in homosexual acts, would be incredible.

6/ With respect to the statement about "his lover," appellant's counsel in the court below conceded "that in the context of that paragraph the word 'lover' obviously must mean a male rather than a female * * *." (Tr. 54).

In view of this information, the Commission asked the appellant to submit explanations of each matter, including the statements of the former Fairfax County supervisor that appellant admitted to being a homosexual, admitted to having been perverted since he was a boy, and admitted having a "lover," as well as the neighbor's accusation that appellant was a homosexual. The Commission also specifically asked appellant "do you now deny that you have engaged in homosexual acts?"

These questions posed by the Commission unquestionably related to appellant's "fitness * * * in respect to * * * character * * * and ability" (5 U.S.C. (1964 ed.) 631) for employment in personnel positions with the executive branch. The Commission's regulation implementing the statute disqualifies from federal employment as not "fit" persons engaging in criminal or immoral conduct (5 C.F.R. 731.201(b)). There can be no doubt that homosexual conduct is properly classified as "criminal." Certain "unnatural and perverted sexual practice[s]" are a crime under the law of the District of Columbia, D.C. Code § 22-3502, and all other jurisdictions make certain types of homosexual conduct, usually under the name of "sodomy," a crime, see 48 Am. Jur. Sodomy, § 1, p. 549; A Psychiatric Evaluation of the Laws of Homosexuality, 29 Temple L. Q. 272 (1956). Homosexual conduct is also properly classified as "immoral". The Commission has stated

that such conduct is "offensive both to the mores and the law of our society" and that it is "considered immoral under the prevailing mores of our society" (J.A. 84).

The Subcommittee on Investigations of the Senate Committee on Expenditures in the Executive Departments, in its Report on Employment of Homosexuals and Other Sex Perverts in Government, Sen. Doc. 241, 81st Cong., 2nd Sess. (1950), stated that:

> it was "well aware of the strong moral and social taboos attached to homosexuality", p. 2;
>
> "sex perverts . . . by their overt acts violate moral codes and laws and the accepted standards of conduct . . . .", p. 3;
>
> "aside from the criminality and immorality involved in sex perversion such behavior is . . . contrary to the normal accepted standards of social behavior. . . .", p. 3;
>
> "persons who indulge in such degraded activity are committing . . . illegal and immoral acts . . . .", p. 19.

The authors of A Psychiatric Evaluation of the Laws of Homosexuality, supra, 29 Temple L. Q. at 277-78, note that sodomy has long been regarded as "abominable" and as a "repulsive" crime. The courts have expressed similar views. The Second Circuit has determined that criminal homosexual conduct involves moral turpitude, United States v. Flores-Rodriguez, 237 F. 2d 405, 409; Babouris v. Esperdy, 269 F. 2d 621, 623, certiorari denied 362 U.S. 913; and this Circuit has followed those decisions, Wyngaard v. Kennedy, 111 U.S. App. D.C. 197, 295 F. 2d 184, certiorari denied 368 U.S. 926.

Since homosexual conduct may be criminal and is generally regarded as "immoral," certainly questions as to whether an applicant for federal employment is a homosexual and has engaged in homosexual acts are relevant to his fitness for employment.

Appellant in his brief argues that the mere fact that one has engaged in "homosexual or sexually perverted acts" does not per se render him unfit for federal employment (Brief, p. 18) and that "no material has been cited to show that employment of a person who engages in homosexual conduct would necessarily interfere with the efficiency of the federal service." (Brief, p. 19). However, these questions need not be decided in the instant case. Assuming, solely for the purpose of argument, that appellant's assertions in this regard might be valid, this does not establish that the Commission's questions were inappropriate. Appellant does not deny that certain types of homosexuals or persons who engage in certain types of homosexual conduct are unfit for federal employment. 7/ Thus, the Commission properly sought to inquire further into the matter. If appellant had been willing to deny or explain the allegation of his former supervisor to the effect that appellant was a homosexual and the similar allegation of the

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7/ See appellant's brief, p. 18, footnote 4, where appellant refers to the existence of homosexual conduct which has resulted in revulsion by fellow employees, to homosexuals who make advances, solicitations or assaults, and to homosexuals who use their positions to foster homosexual activity.

neighbor, and had been willing to answer the Commission's question regarding whether he had engaged in homosexual acts, the Commission might have been able to determine from the explanations and answers whether appellant was fit for federal employment or not. Furthermore, if appellant had answered by stating that he was a homosexual or had committed homosexual acts, but if his answer had been lacking sufficient detail to reveal the type of homosexual acts he was likely to engage in, the answer might have led to further inquiry by the Commission.

Since, at the very least, one who engages in certain forms of homosexual conduct does not meet the statutory standard of fitness for federal employment, it is clearly not unreasonable for the Civil Service Commission to ask an applicant questions relating to possible homosexual conduct when the Commission has information such as it had in this case. The appellant's refusal to affirm, deny or explain the allegations that he had admitted being a homosexual, and his refusal to answer the question whether he had engaged in homosexual acts, fully justified the Commission's decision under the circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

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AUGUST 1967.

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,841

BRUCE C. SCOTT,

Appellant,

v.

JOHN W. MACY, JR., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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Appellees do not contend that they have complied with the mandate of this Court that the Civil Service Commission "specify the conduct it finds 'immoral'." *Scott v. Macy*, 121 U.S. App. D.C. 205, 349 F.2d 182, 185 (1965) (J.A. 27).

Rather they make two points.

One is that being free to exclude the appellant from eligibility for employment "for some ground other than the

vague finding of 'immoral conduct'," *ibid.*, the Commission has chosen as its ground the appellant's "refusal to answer the Civil Service Commission's inquiries concerning homosexual conduct" (See Statement of Question Presented, Appellees' Brief, page (i)). That ground, appellees urge, requires no specification of "immoral conduct."

Two is that the Civil Service Commission's inquiry of the appellant whether he has "engaged in homosexual acts" is an appropriate question, for which the refusal to answer is a proper basis for disqualification.

The short answer to the appellees' two points is that, despite the strain evident in their brief, the administrative decision is not, in fact, based upon the appellant's refusal to answer the question whether he has ever engaged in homosexual conduct. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1955) dispose of their attempt to substitute here another administrative ground as the basis for their decision.

(a) The regulation invoked by the appellees as the explicit basis for their decision is stated as follows:

> "Reasons which may disqualify an applicant from competing in examinations are listed in Part 731 of the Commission's regulations. [5 C.F.R. 731.201]
>
> "Among the reasons upon which disqualification may be based are the following:
>
> (b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct."

By contrast, the regulation which authorizes a disqualification for refusal to answer pertinent questions relating to fitness for federal employment, 5 C.F.R. 731.201(d), much relied upon in appellees' brief (pp. 10, 20-22, 27) but nowhere mentioned in appellees' administrative decision (See J.A. 69-71), provides as a reason for disqualification:

"Refusal to furnish testimony as required by 5.3 of this chapter."[1]

(b) The language of the administrative decision avoids any suggestion that the appellant has been disqualified for a "refusal to give information and testimony in regard to matters inquired of . . ." 5 C.F.R. 731.201(d) A reading of the administrative decision makes it plain that the Civil Service Commission has in the present proceeding, as in the first one which has previously been reviewed by this Court, continued to stigmatize the appellant as one who has engaged in "immoral conduct," albeit by a negative rather than an affirmative finding.

Following a reference to four episodes involving the appellant, each of which without specifically charging any homosexual behavior acts, nonetheless has overtones imputing undefined homosexual behavior (J.A. 42-46, 69-71), the Commission states as a predicate to its decision:

> "Among the reasons upon which disqualification may be based are the following (5 CFR 731.201(b) Criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct." (J.A. 71)

In determining whether the appellant is to be disqualified under this regulation, the decision recites that it is based upon (1) "the investigation" (comprising statements of various persons including the appellant), (2) appellant's "failure to respond to the question . . . (whether he has) . . . ever engaged in homosexual acts," and (3) his "failure to give a satisfactory explanation of the derogatory evidence adduced by the investigation."

The administrative decision does not at all say, as the appellees claim (Appellees' Brief, p. 11) that the "Commission was unable to determine whether the appellant had engaged

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[1] 5 C.F.R. 5.3 provides that ". . . applicants shall give to the Commission . . . all information and testimony in regard to matters inquired of arising under the laws, rules, and regulations administered by the Commission."

in such (immoral or homosexual) conduct, the precise nature of such conduct, and whether he was fit for federal employment . . ."

The specific administrative finding entered by the appellees states that the appellant's "applications . . . are rated ineligible" because the Commission is "unable to conclude that (appellant) meet(s) the standards of fitness for employment in the competitive federal service" (J.A. 71). In reach this decision, the Commission specifically places reliance upon "the derogatory evidence adduced by the investigation." In a context in which the Commission cites as its authority a disqualification for "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct," the term "derogatory" manifestly relates to one of the disqualifications. The finding that the Commission is unable to conclude that the appellant meets the "standards of fitness required for employment" clearly means that the Commission is unable to find that the appellant has overcome the bar against "criminal, dishonest, immoral, or notoriously disgraceful conduct." It obviously does not mean that the Commission was "unable to" make a determination.

This was the understanding of the Court below, which, referring to the allegations in the four episodes declared that the information "justified the Government thinking that there was probable cause to believe that the plaintiff (appellant) had engaged and was engaged in homosexual acts" (J.A. 87).

The distinction between a finding that the appellant "was not fit for employment by the Government" and a decision that the Commission "could not find that he was fit," as appellees' counsel suggested to the Court below, "is a distinction without importance." (J.A. 88)

Whatever significance there may be in the difference between the present negative finding that the appellant has failed to show that he has not engaged in "immoral conduct" and the previous affirmative finding that he has

engaged in such conduct, it would render this Court's earlier decision meaningless if its mandate could be avoided by such a grammatical sleight-of-hand.

(c) The question here is whether by the change in language the Civil Service Commission can avoid the thrust of the two opinions which made the majority ruling in this case when it was first here.

There should be no difficulty in determining "precisely what the mandate of this Court was" (See Appellees' Brief, pp. 14-15). Two opinions concurred in holding that the appellant, being barred for "immoral conduct," the "Commission must specify the conduct it finds 'immoral' (Chief Judge Bazelon's opinion, J.A. 27), and the ". . . 'candidate' . . . who 'seeks to enter' federal employment shall have . . . (an) . . . opportunity to know of . . . (the) asserted personal shortcomings which are officially characterized as 'immoral conduct' (Judge McGowan's opinion, J.A. 31).

The plain thrust of these opinions is that the appellant is not to be barred under the disqualifying language of 5 C.F.R. 731.201(b) relating to "immoral conduct" without being advised of the specifics of such conduct.

In the earlier proceeding, as in the administrative action now under review, the Civil Service Commission sought information as to whether the appellant is a "homosexual" (J.A. 23), or has "engaged in homosexual acts" (J.A. 48).

The appellant's refusal to comment upon the allegation in the first proceeding did not relieve the Civil Service Commission from the obligation to specify the appellant's alleged immoral conduct. Neither should his refusal to answer virtually the identical question in the second proceeding relieve the Civil Service Commission of its obligation to conform to the mandate of this Court.

Garner v. Board of Public Works of Los Angeles, 341 U.S. 716 (1951) and the cases in its wake, *Beilan v. Board of Public Education*, 357 U.S. 399 (1957); *Lerner v. Casey*, 357 U.S. 468 (1957); and *Nelson v. County of Los Angeles*, 362 U.S.

1 (1959) do not govern the issue here. In each of those cases, the specific basis for the discharge of the employee, unlike the case here, was a refusal to provide requested information.

More relevant to the disposition of this appeal are the two *Konigsberg* decisions. In *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957), the State Bar had found that an applicant for the bar had failed to establish good moral character in view of the applicant's refusal to answer questions as to membership in the Communist Party. The Supreme Court reversed, holding that the finding violated due process.

The parallel to the issue here is exact.

In the second *Konigsberg* decision, *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961), the State Bar declined to certify the bar applicant on the sole ground that his refusals to answer had obstructed a full investigation into his qualifications.

No such finding appears here, even were it assumed that the Civil Service Commission has been empowered to inquire of all applicants for federal employment whether they have ever engaged in homosexual acts.

The first *Konigsberg* decision is applicable here. The Commission, which has chosen to reassert its finding upon the same grounds as in its first decision without specifying the disqualifying conduct by the appellant, should now be directed to remove its bar against the appellant's employment by the federal government.

Respectfully submitted,

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